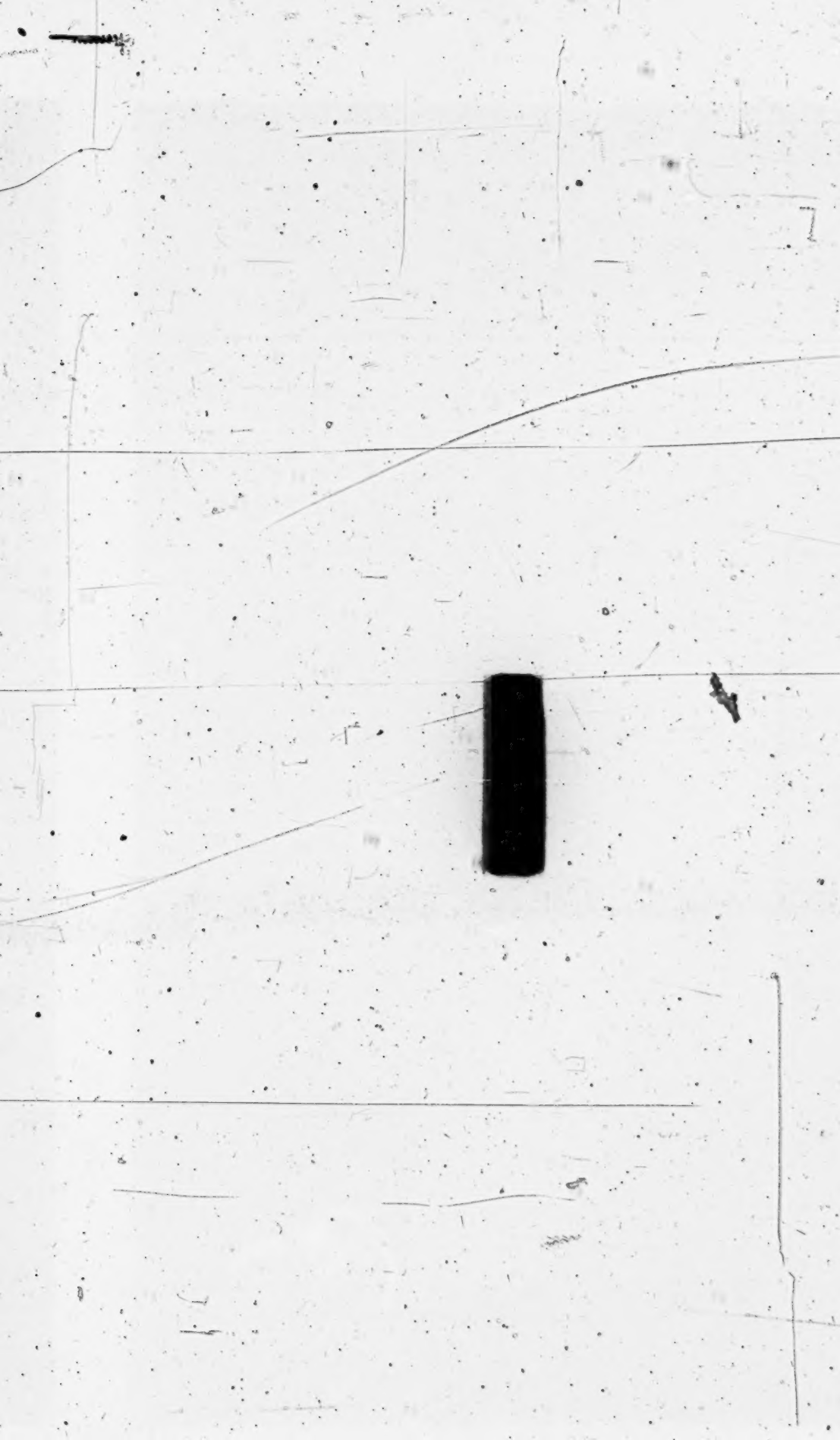


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JOHN T. PEY, Clerk

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1958

No. ~~621~~ 23

UNITED GAS PIPE LINE COMPANY,  
*Petitioner,*  
*vs.*

MEMPHIS LIGHT, GAS AND WATER DIVISION;  
CITY OF MEMPHIS, TENNESSEE; MISSISSIPPI  
VALLEY GAS COMPANY; TEXAS GAS TRANS-  
MISSION CORPORATION; SOUTHERN NATU-  
RAL GAS COMPANY; and FEDERAL POWER  
COMMISSION,

*Respondents.*

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT**

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New York, December 26 1957

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and calling for exhaustive data in support of rate changes (App. 49a-66a).

On the one hand the words "any effective superseding rate schedules on file with the Federal Power Commission" can have referred only to the procedure above outlined. On the other hand the effect of the holding below is that they had no significance at all and were at best a useless and superfluous expression. Such a result is contrary to the rule that a contract should be construed, where possible, to give effect to every word, phrase, clause and sentence. *F. W. Woolworth Co. v. Petersen* 78 F. 2d 47, 49 (CA 10 1935); *Carpenter v. Texas & New Orleans R. Co.* 89 F. 2d 274, 277 (CA 5 1937) cert. denied 301 US 703. The necessary implications of a contract viewed in its entirety are not to be construed away in a technical manner so as to frustrate its obvious design. *Sacramento Navigation Co. v. Salz* 273 US 326, 329; *Nevada Half Moon Mining Co. v. Combined Metals Reduction Co.* 176 F. 2d 73, 75 (CA 10 1949), cert. denied 338 US 943.

The pricing method which the parties did adopt bears close analogy to the formula well recognized in the law for price determination by reference to external standards (p. 23 below). By contrast with the inflexibility of the United-Mobile-Ideal rate, the price formula carried in this service agreement in combination with the filed and posted tariff was framed so as to permit periodic adjustments during the 20- or 25-year term of the service agreements. The expression of intent to this effect by the *parties to the contracts* is clear.

United as seller stated in its answer on the motions that the intent and meaning of the "effective superseding rate schedule" phraseology, so understood by the parties, was to give the seller the right to change rates, where reasonably required to meet the "just and reasonable" standard

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1957

UNITED GAS PIPE LINE COMPANY,

*Petitioner,*

*vs.*

MEMPHIS LIGHT, GAS AND WATER DIVI-  
SION; CITY OF MEMPHIS, TENNESSEE;  
MISSISSIPPI VALLEY GAS COMPANY;  
TEXAS GAS TRANSMISSION CORPORA-  
TION; SOUTHERN NATURAL GAS COM-  
PANY; and FEDERAL POWER COMMISSION,  
*Respondents.*

No. ....

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT**

United Gas Pipe Line Company (herein called *United*) prays for issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered November 21 1957 (App. 12a), together with the underlying decision of that court dated November 21 (App. 1a). These (a) reversed the order of the Federal Power Commission (R. 224-37, on rehearing R. 245-8) denying motions of respondents Memphis Light, Gas and Water Division and City of Memphis, Tennessee (herein together called *Memphis*) and of Mississippi Valley Gas Company (herein called *Mississippi Valley*) to reject as improperly filed by United revised sheets or new rate schedules to its filed and posted tariff provid-

of the statute, with the correlative right in the other contracting parties to oppose and contest the change by the same standard (R. 153-4).

Texas Gas concurred with United's statement of the understanding as to the meaning of "effective superseding rate schedules" in the context of the Regulations and the Act (R. 171-4). Its counsel had the same view on oral argument in the Commission (R. 3).

Counsel for Southern on argument before the Commission took the same position (R. 4), and in its pleadings Southern described the language in question as meaning that it was to

"pay United rates set out in United's applicable rate schedules and that such schedules may be changed by United under the procedures established under Section 4(d), subject to supervision and review by the Commission under Sections 4(e) and 5(a)" (R. 169).

Southern added (R. 169):

"Such was Southern's intention when it executed said service agreements".

Southern also referred to the consistent, tacit construction by the Commission and the industry of identical or similar service agreement provisions as according the seller similar right to change rates on filing, hearing, and Commission approval (R. 170).

Mississippi Valley in its pleadings and briefs below, while not frankly conceding the same understanding and intention as have Texas Gas and Southern, did not contradict or deny it but confined its argument to the legal implications from this Court's decision in the *Mobile* case. The Commission found that practically all customers of United (including Mississippi Valley) have acted through the years in accordance with the contractual purpose and intent entertained by Texas Gas and Southern (R. 235).

ing for increased rates to become effective November 1 1955 and (b) ordered the Federal Power Commission to reject such sheets or new rate schedules as improperly filed and directed appropriate refund.<sup>1</sup>

### **Opinions Below**

The Federal Power Commission's Opinion and Order No. 295 of October 2 1956 denying the several motions of respondents Memphis and Mississippi Valley to reject as improperly filed the new rate schedules or revised sheets to United's filed and posted tariff (R. 224-37) appears in the appendix hereto (App. 13a). The opinion of the Court of Appeals, rendered November 21 1957, is not yet reported and is also set out in the appendix (App. 1a).

### **Jurisdiction**

○The judgment of the Court of Appeals was entered November 21 1957 (App. 12a). The jurisdiction of this Court is invoked under 28 USC § 1254, subd. 1, 62 Stat. 928, and Natural Gas Act § 19(b), 15 USC § 717r(b).

### **Questions Presented**

1. Does the pricing provision of the service agreements contained in a Seller's filed and posted tariff that:

"All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule [designated], or any effective superseding rate schedules, on file with the Federal Power Commission."

which are in effect between petitioner as seller and the various buyers of natural gas (including respondents here)

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<sup>1</sup>The record certified from the court below is herein referred to as R., the appendix to this petition as App.

who executed such service agreements and have accepted service thereunder, empower a change of rates made effective by (a) the petitioner's making and filing with the Federal Power Commission a new rate schedule and (b) the Commission's exercising its statutory powers of review thereon either on its own motion or on complaint of any buyer?

2. Does any provision of the Natural Gas Act render unenforceable such a pricing provision contained in an executed service agreement of a filed and approved tariff prepared in conformity with the Commission's rules and regulations promulgated under §§ 4 and 16 of the Act with respect to a new superseding filing because the buyer had not agreed to the particular new price?

3. Does a court reviewing an order of the Federal Power Commission under § 19(b) of the Natural Gas Act have authority to reverse it upon a construction of the contracts dealt with by such order which is contrary to the Commission's finding (supported by substantial evidence) as to the intent of the contracting parties?

### **Statutes Involved**

The relevant provisions of §§ 4, 5, 16 and 19 of the Natural Gas Act of 1938, 52 Stat. 821 as amended, 15 USC §§ 717 *et seq.*, are set forth in the appendix to this petition (pp. 31a-36a). The relevant clauses of the Regulations thereunder in Part 154—Rate Schedules and Tariffs, *viz.*, §§ 154.1 to 154.86 both inclusive (18 CFR 154.1 to 154.86, hereinafter cited as Reg. 154) are contained in the appendix at pages 37a-70a.

## Statement of the Case

The case arises from objections by Memphis and Mississippi Valley to the jurisdiction of the Federal Power Commission to entertain revised rate schedules filed to its filed and posted tariff by United with the Commission on September 30 1955 to take effect November 1 in so far as they are applicable to the respondents Mississippi Valley, Texas Gas Transmission Corporation (herein called *Texas Gas*) and Southern Natural Gas Company (herein called *Southern*).

(a) *Regulatory background of the tariff and service agreements.* Under authority of § 16 of the Act the Commission promulgated Part 154 of its Regulations effective December 1 1948 requiring restatement and conversion of all contracts filed as rate schedules to a tariff. Reg. 154.14 (App. 38a) defines tariff as:

“The term ‘tariff’ or ‘FPC gas tariff’ means a compilation, in book form, of all of the effective rate schedules of a particular natural-gas company, and a copy of each form of service agreement.”

These Regulations required “the transition of natural-gas pricing by interstate pipe line companies from individual contract, to filed and posted tariffs showing the rates demanded for services to be rendered”.<sup>2</sup> The purpose was to change the prevailing practice of individual contracts “frequently arrived at after extensive negotiations between the parties”, which varied greatly in form, to a standard content as required by the Regulations for “uniformity in treatment of all customers of an individual natural-gas

<sup>2</sup>See 29th Annual Report of the Federal Power Commission (1949), pp. 110-12.

company, representing a direct approach to the elimination of discrimination”.

In Opinion and Order 294 issued October 2 1956, 15 PUR 3d 216 at 218, the Commission thus described the general structure of the gas tariffs which it so caused to be adopted by all natural gas companies subject to its jurisdiction:

“An FPC gas tariff filed in pursuance to Order No. 144 contains in one volume all information pertinent to jurisdictional service rendered by the natural gas company. First, there are set forth the rate schedules for all classes of service (an index of purchasers identifying the rate schedules under which each buys gas is contained at the end of the volume). Following the rate schedules are the general terms and conditions which make uniform for all service rendered by the natural gas company such provisions as the definition of terms, the quality and measurement of gas to be delivered, billing, payments, and delivery pressures. Also included within the tariff is the form service agreement to be executed by the natural gas company and the purchasing companies. With such a tariff, all conditions of service, including the rates, can be readily ascertained for all purchasers from one natural gas company.”

The Regulations (App. 37a-70a), read in this light, reflect a regulatory design of a tariff containing (a) a service agreement stating the term of service and broad governing conditions and (b) a complementary but distinct and independent series of rate schedules stated to be available to each member of the class coming within each rate schedule. It was the design of the rate schedules that they should be flexible and subject to change to meet the regulatory standards of the Act, whereas the service agreement was framed as a static arrangement not generally subject

to change. Such a tariff is required by Reg. 154.16 (App. 38a) to be posted in the place of business of the natural gas company, available to all customers being served there, and applicable portions of the tariff are required to be mailed to each customer affected.

Under these Regulations the operations of the natural gas companies in the rendition of service subject to the jurisdiction of the Commission were governed by a tariff containing rate schedules which the parties by the service agreement adopted. Each service agreement here is in the form contained in United's FPC gas tariff, prepared strictly in accordance with the Regulations upon consultation with the staff of the Commission (Reg. 154.24; 154.25 [App. 39a]) and thereafter filed with and accepted by the Commission and posted in accordance with its Regulations. This procedure included the notice to each customer affected (Reg. 154.16 [App. 38a]) together with the opportunity for their comments (Reg. 154.27 [App. 40a]).

Pursuant to the design of the Regulations and in accordance with the general understanding of all parties before the Commission including petitioner and the respondents herein, changes in the rate schedules have been accomplished from time to time by the filing of revised sheets to the rate schedules of the filed and posted tariff. Such was the method of the filed increase to which the instant motions were addressed in the Commission.

(b) *Service agreements in force September 30 1955.* At the date of such filing service agreements executed on the approved forms were outstanding between United and respondents among other purchasers as follows:

*With Mississippi Valley*, one service agreement dated March 25 1955 (industrial use only) and running into 1962 (R. 61-6), and two others of the same date running to 1975 (R. 67-74j).

*With Southern*, one service agreement made September 30 1952 and stated to remain in force for 20 years (R. 92-9).

*With Texas Gas*, a contract dated April 16 1945 covering the Monroe Field, converted on August 3 1952 by means of a conversion tariff pursuant to Order 144, which effected a change in rates and led to subsequent increased rates paid by Texas Gas to United under the applicable rate schedules effective from time to time as filed with the Commission (R. 150, 234); and also a regular service agreement executed August 11 1952 (R. 108-15) expressed to continue in force for 25 years.

Each of the five service agreements above enumerated in force between United and the three named purchasers in 1955 contained a pricing provision as follows:

#### "Article IV [V]

##### Price

All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule [designation], or any effective superseding rate schedules, on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached thereto and filed with the Federal Power Commission which are by reference made a part hereof."

Since the filing of United's conversion tariff July 3 1952 increased rates provided in the applicable rate schedules effective from time to time as filed with the Commission pursuant to the regulations have been regularly paid by United's customers generally (R. 234, 236, 247).

(c) *Nature and effect of September 30 1955 filing.* On that date United filed with the Commission 31 superseding revised sheets to the tariff designated to take effect Novem-

ber 1 1955 (R. 55-9). These sheets constituted a general rate increase applicable to all of United's sales for resale subject to the jurisdiction of the Commission. They were supported by the voluminous data required by Reg. 154.63 (App. 49a-60a) and were posted and served on each purchaser as required by Reg. 154.16 (App. 38a). This was the same method by which prior rate increases had been effected.

(d) *Proceedings on September 30 1955 filing.* By order of October 21 1955 the Federal Power Commission suspended the new rates pursuant to §§ 4, 5 and 15 of the Act (except as to industrial rates) until April 1 1956 (R. 115-8), after which date the new rates came into effect subject to refund. Among the intervenors were Texas Gas, Southern and Mississippi Valley which alleged that it obtained certain natural gas directly from United (R. 131):

From the date of filing of the new rate schedules until their motions of March 1956 leading to the order now under review, Mississippi Valley and Memphis made no move to deny United's right to file revised rate schedules with the Commission. They proceeded on the contrary upon the assumption that such right existed, even after the decision of the Third Circuit Court of Appeals in the *Mobile* case, rendered September 7 1954, 215 F. 2d 883. It was only after this Court announced its opinion in the *Mobile* case February 27 1956, 350 US 332, that Mississippi Valley and Memphis moved in March 1956 to reject, cancel and dismiss United's filings and to require refund of the increases so far as collected (R. 143, 162).

(e) *Decision of Federal Power Commission.* After oral argument held May 25 1956, the Commission on October 2 1956 made its Order No. 295, denying the motions to dismiss with an extensive opinion, which analyzed the tariff and service agreements, pointed out the distinction between

them and the single fixed-price contract in the *Mobile* case, and held that the filed and posted tariff with service agreements afford an agreed machinery of change theretofore operated by the parties (R. 224-37). Applications for rehearing were denied November 23, 1956 (R. 245-8).

(f) *Judgment of the Court of Appeals.* On November 21, 1957 the District of Columbia Circuit Court of Appeals unanimously reversed the Commission's determination on the ground that United's revised rate schedules were the kind of unilateral change condemned by the reasoning and by the terms of this Court's opinion in the *Mobile* case. The court called this case "a close copy of *Mobile*" in every pertinent aspect save one (App. 5a). The single difference found by the court was the provision for payment under the tariff schedule "or any effective superseding rate schedules on file with the Federal Power Commission" (p. 7 above), and that difference it found not to be material.

In spite of the Commission's finding that the parties intended this clause, in the context of service agreement and filed and posted tariff, to empower United to make rate changes, subject only to the Commission's review of these changes pursuant to §§ 4 and 5 of the Act, and that this clause supplied the assent necessary to prevent such increase from being the prohibited unilateral change, which finding the court assumed to be correct (App. 6a-7a), the court below nevertheless held that the Commission lacked jurisdiction to accept such a schedule for filing and to review it under § 4(e) in the absence of a *specific agreement between the parties to the particular new rate*.

The court felt that the decision in the *Mobile* case requires the seller to bring to the Commission a negotiated agreement in order for the Commission to review rates under § 4(e) (App. 8a). Quoting extensively from this Court's analysis of §§ 4 and 5 at p. 341 and at p. 342 of

350 US, the court held that United had not the consent of its customers to the new rates themselves, that the effect of the clause relied upon by it and its customers was no more than a consent "to the act of filing", and that therefore the Commission had no power to file or to review the new schedules (App. 7a-10a).

### **Reasons for Granting the Writ**

This is a case of vital importance to the natural gas industry and to the consumers dependent upon it, because the gas transported and sold in interstate commerce for resale is sold under filed and posted tariffs substantially similar to the tariff here under review. The functioning of the Act and the review powers of the agency administering it are thrown into utter disorder by the decision below, which destroys the agreed relationships upon which rest the industry's commercial practices.

The type of tariff with service agreement dealt with by the court below has been regularly adopted, with Commission sanction, as the foundation for long-term commitments necessary to permit the financing of extensive and costly installations for public service. The very life of these commitments depends upon the adaptation of prices over the term to reflect significant variations in cost. In recent years such variations have been upward in this as in other segments of the economy. Expansion of facilities, the increase of service to meet growth of connected customers, the very continuance of service cannot be assured without providing for changes of cost.

The mechanism adopted for that purpose by seller and buyer acting in the context of the Regulations was the familiar one of stipulating adjustments at the initiative of the seller in conformity with an external standard. The external standard selected here was devised so as to conform

to the statutory requirements laid down in §§ 4 and 5 of the Act and the Commission's regulations, for which Congress had granted authority under §§ 4 and 16. The essential mechanism of change, definite and well understood by the parties, was the filing of "superseding" rate schedules by the seller. But because this is a regulated industry the contract also stipulated that only those schedules shall supersede which succeed in becoming "effective" by meeting the standards of administrative review.

Thus there was reserved to the Commission the full exercise of its statutory review functions but there was not imposed upon the Commission (contrary to the conclusion of the court below) any participation in the determination of rates as "arbitrator" or otherwise beyond that review for which the statute makes explicit provision. The related form of service agreement and rate schedules combined into a tariff with general terms and conditions was the product of the Commission's broad powers of regulation directed to working out the pragmatic adjustments which the problem requires.

The action of the Court of Appeals in using the *Mobile* case to cut apart this integrated but flexible structure is a technique of Procrustes which misapplies that case and threatens the business practices not only of petitioner but of the whole natural gas industry. Wholesalers of natural gas cannot as a practical matter be relegated to separate negotiations with their numerous purchasers for price adjustments and they in their turn to bargaining with their scattered customers. The *Mobile* case dealt only with, and its rationale is limited to, a specific contract conditioned for a term and at a price upon a known resale arrangement. That contract contained no provision for change of price. The instant case concerns on the contrary a deliberately conceived mechanism of adjustment necessary for long-term performance, turns on the administrative machinery erected

by the Commission for that purpose, and presents a picture of change in rate pursuant to the contract, not contrary thereto.

In the *Mobile* opinion this Court expressly declared that the Natural Gas Act left unimpaired the contract powers of natural gas companies. It did not strike at the form of filed and posted tariff and service agreement here involved, even by indirection. The literal application by the court below of selected language from the *Mobile* opinion to the present quite different state of facts, results in misinterpretation of an important Federal statute in striking down the necessary power to initiate change in rates to accord with changes in costs. This is a blow at the foundation of the regulatory scheme intended by Congress, and requires the interposition of this Court by writ of certiorari.

### POINT I

**THE COURT BELOW HAS DECIDED ERRONEOUSLY A FEDERAL QUESTION OF VITAL IMPORTANCE IN APPLYING TO MULTILATERAL CONTRACTS IN TARIFF FORM WITH ADJUSTABLE PRICE CLAUSE, THE LANGUAGE OF THIS COURT DIRECTED TO A SINGLE FIXED-PRICE CONTRACT BILATERAL IN FORM WITHOUT ADJUSTABLE PRICE CLAUSE**

The Court of Appeals wrongly deemed the holding of this Court in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.* 350 US 332 (1956) to be controlling upon the present record. Quite apart from the impact of the decision below upon long-established administrative practice in the natural gas industry, the error of the decision is that the states of fact presented in the two cases are radically different, and that the expressions of this Court in the *Mobile* case must be read in the framework of the facts there presented for decision.

**(1) Facts in *Mobile* record contrasted with facts in present record**

**(a) Facts in the *Mobile* case**

As this Court knows, the *Mobile* case presented the single question of what the Court held to be a unilateral change by the seller in its ten-year contract to supply to the buyer gas for resale to Ideal Cement Company at a specified price (350 US at 336). This price was substantially lower than that for other gas furnished by the seller. The contract in question was Supplement No. 10 to Supplement No. 7 of a general contract between the parties dated January 1 1936.

Supplement No. 10 consisted of an exchange of letters between the parties June 28 and July 30 1946 specifying a specially low rate for a ten-year period from the beginning of deliveries under certain rate schedules so that the buyer might resell at a price agreed upon by it with Ideal Cement Company for the same period (pp. 90-5 of *Mobile* record). It covered "all gas delivered by you [United] to us [Mobile] during the period hereinabove specified and sold by us to Customer [Ideal]" and was accepted by United Gas Pipe Line Company "subject to our obtaining the approval of the Federal Power Commission" (p. 95 of *Mobile* record). No right of amendment during the ten years was reserved except for changes upward or downward in certain defined taxes, and then only "to the extent collected from Customer" as regards increases paid by the seller (pp. 93-4 of *Mobile* record).

This special contract for the benefit of Ideal received Commission approval September 17 1946 (pp. 56-7 of *Mobile* record).

Although the United-Mobile contract became a part of United's filed schedules of rates and contracts, it continued unchanged as an independent bilateral agreement

for a fixed term (215 F. 2d at 884-5 n. 3; 350 US at 336). Upon United's filing new schedules which purported to increase the rate on gas for resale to Ideal, Mobile intervened in the Commission on August 12 1953 (p. 72 of *Mobile* record). Its petition to modify and amend the filing of United attacked the increases of rate only "in so far as said Sheets apply to sales to Mobile for resale to Ideal Cement Company . . . because said Revised Sheets seek to effect a unilateral increase in existing rates for natural gas fixed by a firm contract between United and Mobile . . ." (p. 8 of *Mobile* record). It was the denial of this petition which Mobile brought up for review to the Court of Appeals and which thus came to this Court (pp. 95-103 of *Mobile* record). By deliberate choice Mobile limited its attack to the rate fixed by the Ideal contract. This clearly appears from the Commission's Opinion No. 277 approving United's settlement tariff on October 26 1954, (*In the Matter of United Gas Pipe Line Company*, Docket No. G-1142 etc.), which points out Mobile's approval in the settlement terms on the United rate schedules, of every item except the rate for resale to Ideal Cement Company. This position was advisedly taken by Mobile well after the Third Circuit had on September 7 1954, 215 F. 2d 883, confirmed its objections to the change in the rate for resale to Ideal.

The narrow frame of the issue tendered to this Court and dealt with in the opinion, 350 US 332, is manifest.

**(b) Facts in the *Memphis* case**

The present record brings up for the first time the full breadth of the issue as to the effect of a provision for price change under the clause "under Seller's Rate Schedule . . . or any effective superseding rate schedules, on file with the Federal Power Commission" (p. 7 above), as part of a service agreement in a filed and posted tariff. These words

in the context of the Regulations have decisive meaning. They import an amendment as to price, either upward or downward, because it would be vain to use such a formula merely to reserve the possibility (as was argued by opposing counsel below) of the parties replacing the existing contract (in schedule form) by a new contract. No saving language is needed to preserve the parties' right to make a wholly new contract.

On the other hand the reference to "effective superseding rate schedules on file with the Federal Power Commission" plainly has in view—

(i) some future change upward or downward in rates;

(ii) registration of the change by putting "on file" in the filed and posted tariff "superseding" rates of a revised rate schedule;

(iii) some method for making this change "effective";

(iv) the statutory powers of the Commission to regulate the filing of rate schedules including contracts (§ 4[c] of the Act), to obtain notice of, review, suspend, and determine the lawfulness of new schedules filed (§ 4[d] and [e]); and to determine just and reasonable rates whenever after hearing it finds any rate demanded or collected by a natural gas company to be unjust, unreasonable, unduly discriminatory or preferential (§ 5[a]);

(v) provisions of the Regulations under the Act requiring public filing and posting of rate schedules in tariff form on and after December 1 1948 (App. 37a); determining the form of the tariff (App. 40a, 46a), the composition of the rate schedule (App. 44a-45a), and the composition of the service agreement (App. 46a);

## (2) Decision in *Mobile* case contrasted with decision of the Court of Appeals here

### (a) Decision in the *Mobile* case

The language of this Court in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.* was directed to the particular state of facts there presented, and the legal significance of its holding is restricted thereto. Marshall, C. J. in *Cohens v. Virginia* 6 Wheat. 264, 398; Jackson, J. in *National Mutual Ins. Co. v. Tidewater Transfer Co.* 337 US 582, 604, note 26. The Court considered that it was dealing with a "long-term contract" (350 US at 334) and pointed out that the Act "evinces no purpose to abrogate private rate contracts as such" (p. 338). It remarked that § 4(d) of the Act gave no basis for inferring that the mere imposition of a filing-and-notice requirement [that is, by the terms of the statute] was intended to make effective action [that is, unilateral amendment in the absence of any price adjustment clause] which would otherwise be of no effect at all (p. 339). Much of the opinion deals with the contentions there made as to the construction of § 4 in relation to other provisions of the Act, after which followed the statement that the Act (p 343)

"presumes a capacity in natural gas companies to make rates and contracts and to change them from time to time, but nowhere in the Act is either power defined".

The implication drawn by the Court is that, except as limited by the Act, the rate-making powers of natural gas companies were to remain as they were in the absence of the Act (p. 343). The sentence then continues:

"... to establish *ex parte*, and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer."

What such establishing or changing of rates *ex parte* might entail the Court did not discuss, nor was there need that it do so. Elsewhere in the opinion the Court referred to §§ 4 and 5 of the Act as parts of a statutory scheme under which all rates are established initially by the natural gas companies "by contract or otherwise" (p. 341). The content of "otherwise" was not elucidated, nor was there need that it should be in the *Mobile* case.

The rationale invoked by this Court for the limited United-Mobile-Ideal relationship has been, in our submission, distorted in its application to defeat a general tariff with service agreement and adjustable price clause.

#### **(b) Decision in the *Memphis* case**

The court below erred in the first instance by saying that this case is, except for the "superseding rate schedules" language "a close copy of *Mobile*" (App. 5a). Our statement of the facts (pp. 4-10 above) shows that the surrounding complex of documents, as well as the expressed intent of the parties, is widely different, not similar.

The court mistook the import of the *Mobile* decision by treating it as if it dealt with jurisdiction of the Commission to accept a schedule for filing (App. 7a), whereas the *Mobile* decision in that aspect was directed to a contention (not here advanced) that §§ 4 and 5 of the Act read together establish a procedure for changing rates regardless of consent. The rejection by this Court of such contention still left standing this Court's appraisal in the *Hope Natural Gas* case of § 4 as "the heart of the new regulatory system under the Act" (320 US at 611) which "contains machinery for obtaining rate adjustments" (p. 615) under the Commission's "apparently broad statutory authorization over prices and discriminations" (p. 660). Footnote 3 to the opinion of the Court of Appeals in the

*Memphis* case indicates that two members of that court do not share this view of § 4.<sup>3</sup>

From this Court's opinion (350 US at 339) as to the relation of §§ 4 and 5, the court below drew the conclusion that § 4(d) was held to be "merely a requirement" of formal notification of any change in a gas sales contract by the seller (App. 7a), whereas this Court did not in reality draw such a limitation but said, after discussing the language of the statute (p. 339):

"The section says only that a change *cannot* be made without the proper notice to the Commission; it does not say under what circumstances a change *can* be made." (italics by the Court)

This is plain notice that the *Mobile* opinion did not prescribe the mechanics of contractual change. Yet the Court of Appeals erroneously goes on to say that "under the rule in *Mobile*" the Commission cannot review rates under § 4(e) unless the seller brings to the Commission "a negotiated agreement" (App. 8a). Apparently the court below thought that this meant the same kind of bilateral agreement as was presented in the *Mobile* record in the form of Supplement No. 10 to Supplement No. 7 (p. 13 above). And the error goes even farther. Says the Court of Appeals (App. 8a):

"And that agreement to the new rate must be as specific in its terms as was the previous contractual agreement to the rate schedule sought to be superseded."

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<sup>3</sup>In this footnote (App. 10a) two judges of the court "speaking only for ourselves" state that acceptance of the position of the Commission and the intervenors in this case "would be to give approval to a ready means of debilitating Section 5(a)" and permit "the natural gas company seeking an increase" to "avoid that statutory scheme by securing its customer's *consent merely to the act of filing* . . ." (italics supplied). In addition to being an erroneous construction of the contract in the case at bar (as pointed out elsewhere at p. 22 above) this is a radically new analysis of § 5 in relation to § 4.

The same erroneous inference from this Court's prior decision that the parties must, in connection with a change of rate, have "agreed to the specific rate" appears elsewhere in the opinion below (App. 9a). The court holds flatly that the service agreement conferred no power to file the new rate schedules and that the Commission could not review the new rate because "United had not obtained the consent of its contract customers to the rate itself". In connection with this conclusion no heed is paid below to the context of the Regulations determining the forms in which the service agreements are set. Yet in view of their statutory base the Regulations have full force of law: *Atchison etc. Ry. Co. v. Scarlett* 300 US 471, 474, rehearing denied 301 US 712; *Columbia Broadcasting System v. United States* 316 US 407, 417; *United States v. Shaughnessy* 347 US 260, 265. No adequate account is taken by the court below of the fact that the parties could not go beyond those set forms. No effect is given by the decision below to the parties' voluntary execution of the service agreements and their performance thereunder, indicating that their signature carried full knowledge of what the words meant. No real recognition is accorded the words themselves "any effective superseding rate schedules on file with the Federal Power Commission". Nor is any reference made by the Court of Appeals to the Commission's explicit finding in this record concerning the intent of the parties in relation to their agreed procedure for adjustable rates (R. 231, 233), except for the erroneous paraphrase (App. 9a)

"... albeit some of those customers may have consented to *the act of filing* ..." (italics supplied)

Comparison with the portion of the Commission's opinion quoted by the court itself (App. 6a-7a) will show that this is an incorrect statement of the actual holding there. Failure by the Court of Appeals to enforce the contract

as found by the Commission is not consonant with that respect for the integrity of contracts taken by this Court as the key to its decision in the *Mobile* case, 350 US at 344.

**(3) Established formula for price adjustment by reference to external standards**

In our view the contracts here involved expressly provided for the change effected in the September 30 1955 rate schedules of United. This is not to say that the purchasers had no right to contest that change, because under the service agreement read in connection with the filed and posted tariff and the statute, they had of course the right to seek review by the Commission under §§ 4 and 5 pursuant to the statutory standards of justness and reasonableness. The contract found by the Commission falls into a well-defined category.

Under this contract, being a public tariff multilateral in form, a change is (i) initiated by the filing by United of a new rate with the notice required by § 4(d), (ii) completed by its acceptance (through failure to object, continuing performance, etc.) by members of the class affected and by the Commission, or (iii) modified by the process of administrative review (for which specific powers are granted by §§ 4 and 5) with the participation of any affected purchaser who may intervene. The procedure thus utilized is that erected by the Act itself. It is not, as the court below seemed to think, the appointment of "a third party to arbitrate" or the attempted vesting of the Commission with power not given it by Congress (App. 9a).

Persuasive analogy is found in the numerous cases applying the law of contract to the determination of price by reference to external standards.

*Memphis Furniture Co. v. Wemyss Furniture Co.* 2 F. 2d 428, 432 (CA 6 1924; prices prevailing at time of shipment);

*Keystone Steel & Wire Co. v. Pierce Oil Corp.*  
17 F. 2d 476 (CA 7 1927; sale on basis of posted market prices with increase or decrease by 60% of each increase or decrease in posted market price by five-cent installments);

*Ken-Rad Corporation v. R. C. Bohannon, Inc.*  
80 F. 2d 251 (CA 6 1935; sale at list prices with reserved right in seller to change list price and discount rate);

*Col-Tex Refining Co. v. Coffield & Guthrie, Inc.*  
196 F. 2d 788 (CA 5 1952; sale at a price posted by seller based on average posted price of any three of the major companies for like grades in the area);

*Cities Service Gas Producing Co. v. Federal Power Commission* 233 F. 2d 726 (CA 10 1956; sale at prevailing field price at the well-head in designated fields plus reasonable gathering charges, prices to be adjusted from time to time to reflect prevailing field price), cert. denied 352 US 911;

*Pfotzer v. United States* 176 F. 2d 675 (CA 4 1949; sale at stated price subject to increase in accordance with applications on file with Office of Price Administration prior to shipment or to legal price in effect at time of shipment).

Cf. *Outlet Embroidery Co. v. Derwent Mills* 254 NY 179, 183 (Cardozo, J. 1930; prices subject to change pending tariff revision);

1 *Williston on Sales* (1948) § 167.

In the *Cities Service* case, the Tenth Circuit said in sustaining the enforceability of the price adjustment clause in the contract (233 F. 2d at 729, 730):

“The conclusion is inescapable that the meaning of paragraph 2 is that the prices for the gas were the prices set out in the contract, that such prices

would remain until new prices were established in accordance with the formula set out in the contract, and that such new prices applied only prospectively.

The contract clearly contemplates prospective adjustment of prices. While it is not free from doubt, we are inclined to agree with petitioner's contention that the yardstick for the determination of such prices is sufficiently definite. 'Prevailing field price' has a definite and well understood meaning in the oil and gas industry. What is the prevailing field price is a question of fact which can be readily ascertained, and any method which would fairly reflect such price would be a proper yardstick under the contract."<sup>4</sup> (*italics supplied*)

Compare *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.* 341 US 246, 251 holding that the natural gas company

"... can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission ..."

and that

"... the right to a reasonable rate is the right to the rate which the Commission files or fixes ..."

In none of this well-settled line of decisions (the so-called posted price cases) was the fact of disagreement between the parties as to the proper figure to be fixed through their agreed procedure of price determination, employed by the court as a ground for holding that the parties had not agreed on the procedure. The phrase "any effective superseding rate schedules" unquestionably embodied such an agreed procedure when its point and mean-

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<sup>4</sup>The attempted change in rate was held unenforceable under the circumstances because the required filing under the Act was not done.

ing are perceived in the regulatory environment and framework of forms in which the parties operated (pp. 4-6 above). This fact points to a basic error in the decision of the Court of Appeals. It concluded that no effective procedure for price change had been incorporated in the service agreement because the three purchasers "are now opposing United's increase before the Commission" (App. 7a). Yet a contest as to the particular amounts claimed by the seller to be due under the accepted method of price determination, does not negative the existence of a consensual arrangement to that end, as is illustrated by the cases above cited.

We repeat that the matrix in which the natural gas companies are obliged to formulate their agreements, particularly with regard to changes in a tariff or executed service agreement, is established in § 154.63 of the Regulations (App. 49a-66a). For rate increase filings detailed Statements A through N are prescribed (App. 53a-65a). The absence of more specification in United's procedure for price modification is due to § 154.38 of the Regulations (App. 44a-45a). In subdivision (d)(3) thereof the Commission forbids the utilization of a formula which would *automatically* revise the rate, so as to impede the Commission in its statutory duty of review. This subdivision provides:

"(3) No rule, regulation, exception or condition, such as tax, commodity price index, wholesale price index, purchased gas cost adjustment clauses or other similar price adjustments or periodic change shall be included in the rate schedule or any other part of the tariff *which in any way purports to effect the modification or change of any rate or charge specified in the rate schedule, or the substitution therefor of any other rate or charge.* Provided, however, a natural-gas company may state in the service agreement or in rate schedules filed pursuant to § 154.52 that it is or will be its privileges under

certain specified conditions, to propose to the Commission a modification, change or substitution of the then effective rate or charge: *Provided further*, That no such clause may effectuate a change in an effective rate or charge except in the manner provided in section 4 of the Natural Gas Act, as amended, and the regulations in this part." (*italics supplied*)

This limitation upon the formulation of the contract could not as matter of law operate to deprive United Gas Pipe Line Company of its contractual powers or the fruits of any contract intended; and the District of Columbia Circuit Court of Appeals in the litigation between United and the Commission on these very rules has so held. *United Gas Pipe Line Co. v. Federal Power Commission* 181 F. 2d 796, 799 (DC Cir. 1950), cert. denied 340 US 827. Yet the result reached by the court below, in depriving United of the intended flexible mechanism for price adjustment, frustrates a contractual design absolutely essential to operate a series of long-term commitments.

Thus the holding below may in certain aspects violate the Fifth Amendment by impairing United's rights to make contracts providing effectually for price change. On the one hand the Court of Appeals held that the filing of a new rate schedule under the reservation in the "effective superseding rate schedules" clause is prohibited by the Natural Gas Act. On the other hand, Regulations Part 154, based upon the Commission's administrative experience, forbid all gas sales contracts with an escalation clause. In these circumstances the lower court's construction of the Natural Gas Act which nullifies the type of contract here presented—a form found by the Commission to be reasonably adapted to the public interest and to proper administration of the Act—arbitrarily limits the right to contract for a just and a reasonable rate. Such a construction of the statute is not favored. *Nebbia v. New York* 291 US 502, 525.

## POINT II

**THE DISTRICT OF COLUMBIA CIRCUIT ITSELF HAS EXPRESSED VIEWS ON THE TYPE OF CONTRACT HEREIN INVOLVED WHICH ARE IN CONFLICT WITH THE DECISION BELOW**

Curiously enough the same Court of Appeals (with a panel differing slightly from that sitting in the instant case) has rendered decisions at variance with the decision here on this very point of the effect of the *Mobile* case, 350 US 332, on a general tariff and service agreement with similar price clause.

*Cincinnati Gas & Electric Co. v. Federal Power Commission* 246 F. 2d 688 (1957);

*Portsmouth Gas Co. v. Federal Power Commission* 247 F. 2d 90 (1957).

These were separate petitions to review a single order of the Commission which approved new tariffs of United Fuel Gas Co. and Central Kentucky Natural Gas Company changing their demand-commodity rate form by providing for a contract demand over a long term and which also provided for substantial increase in demand and commodity charges and for a long-term contract demand. The hearing was limited to the contract demand element of the proposed rate form.

In the *Cincinnati* case the court held that the petitioners were not aggrieved, but in so doing touched on the contention here involved. One of petitioners' points was that, in approving the long-term contract demand, the order unlawfully changed the gas service agreements between Central Kentucky and Cincinnati-Union without the necessary finding that the agreements adversely affected the public interest. The petitioners relied upon the *Mobile* and *Sierra* cases. The court, while deeming it unnecessary to

discuss this contention under the view it took of the case, nevertheless did so as follows (246 F. 2d at 693):

"These cases are readily distinguishable from this one, for here the service agreement expressly contemplates future filings and there has been no unilateral change in rates fixed by contract."<sup>5</sup>

As shown by the record in that case the service agreement there involved contained substantially the same clause as that employed by United, referring to "any effective superseding Rate Schedules".

The *Portsmouth* case was a petition for review of the same order by a retail distributor of natural gas, which claimed to be aggrieved because its requirements contract was "unilaterally modified and rescinded" (247 F. 2d at 91). *Portsmouth* also cited the *Mobile* and *Sierra* cases. The record was in confusion as to the actual contract between the parties, although the seller United Fuel Gas Company claimed that as a result of a settlement in which *Portsmouth* participated new rates were established and paid in accordance with its then filed rate schedules or in "effective superseding rate schedules" (247 F. 2d at 93).

After quoting from the *Mobile* case, 350 US at 343, and from the *Sierra* case, 350 US at 353, the court said that it did not know whether the condition precedent of a finding was met by the Commission in substituting a demand-commodity rate for the contract rate, but that in any event (p. 94):

"If the contract rate was unilaterally changed by United Fuel with Commission approval and so was ineffective, *Portsmouth* may nevertheless be bound by the change if it offered no opposition, and has since acquiesced. That is a question we do not reach in the present state of the record."

<sup>5</sup> Analysis of the proposed change in rate schedules indicates that an alteration of rates was involved.

These two decisions, although leading only to remand, are inconsistent in their reasoning with the determination of the same court in the present case to the effect that the *Mobile* rationale requires a reversal of findings that the service agreement here expressly contemplated future filings and there had been no unilateral change in rates fixed by contract. The two cases were pressed by United's counsel upon the Court of Appeals but received no comment in its opinion.

The intra-circuit conflict thus indicated is additional ground for a grant of certiorari. *Dickinson v. Petroleum Conversion Corporation* 338 US 507, 508; *John Hancock Mutual Life Insurance Co. v. Bartels* 308 US 180, 181.

### POINT III

**IT IS SEPARATE GROUND FOR CERTIORARI THAT THE COURT OF APPEALS CAME TO A CONCLUSION SO DESTRUCTIVE TO THE PRICING POLICY OF THE GAS INDUSTRY BY DISREGARDING IN VIOLATION OF § 19(b) OF THE ACT THE COMMISSION'S FINDINGS**

The Natural Gas Act in § 19(b) (App. 35a-36a) provides that the finding of the Commission as to the facts if supported by substantial evidence *shall be conclusive*. *Colorado Interstate Gas Co. v. Federal Power Commission* 324 US 581, 595 (1944); *Montana-Dakota Utilities Co. v. Federal Power Commission* 169 F. 2d 392, 398 (CA 8 1948), cert. denied 335 US 853. We have already summarized (pp. 16-8 above) the record evidence of the intent of the parties to the effect that the amendatory clause here in question was an agreed mechanism of price change subject to Commission review. There is in this record no other evidence of consequence on the point. The Commission in obedience to the evidence expressly found:

"The words 'or any effective superseding rate schedules on file with the Federal Power Commission' clearly contemplate the understanding and intent of the contracting parties that changes could properly be made by United in the rates contained in the applicable rate schedules in effect at the time of execution of the service agreement. It is equally clear that it was the understanding and intent of the parties that the purchaser would pay the rates set out in the applicable rate schedules effective from time to time and that changes could be made therein by United under the procedures established under section 4 of the Act." (R. 231)

"[After a description of the conduct of various parties including Southern and Texas Gas], And these parties, as well as practically all other customers of United, have acted through the years in accordance with this contractual purpose and intent.

The contracting parties are in complete agreement as to the meaning and purpose of their contracts." (R. 235-6)

The contrary conclusion of the Court of Appeals in derogation of these findings supported by the only substantial evidence, merits review at the hands of this Court under §19(b) by reason of the harmful effect of that decision. Its consequence is to defeat regulation of rates to conform with changes in cost by giving the buyer in each instance a right of veto over the needed adjustment, short of the development of such circumstances as actually threaten the financial stability of sellers. It is just cause for confusion and concern to natural gas companies, by reason of its impact upon long-term commitments in a period of rising costs. These very words "any effective superseding rate schedules" frequently appear, and like phrases also frequently occur, in service agreements ex-

cuted by numerous other wholesalers of natural gas, in the same relationship with a filed and posted tariff under the Regulations.

The ground for the concern of natural gas companies is readily understood when it is realized that for the obtaining of a certificate of public convenience and necessity under § 7 of the Act, Part 157 of the Regulations requires a showing of the applicant's gas purchase contracts, the effective dates, and the remaining terms in years of such contracts (§ 157.14 Exhibit H). Conformed copies of the contracts relied upon must be attached (§ 157.14 Exhibit H). The policy of the Commission with respect to the term of commitment is described as follows by a standard authority:

"The Federal Power Commission, in its regulation of interstate pipe lines, generally insists that a pipe line have at least a twenty-year reserve supply to qualify for authority to complete or extend its system." (*Standard & Poor's Industry Service, Utilities-Gas*, pp. U-36-7 [July 4 1957]).

Hence the offsetting sales agreements of pipe-line companies within the Commission's jurisdiction carry long-term commitments for which a price adjustment clause is indispensable.

## CONCLUSION

Misunderstanding by the Court of Appeals of this Court's action in the *Mobile* case has resulted in a decision nullifying the essential price adjustment clause in a structure of long-term commitments based upon related tariffs and service agreements carefully built up through the regulatory process. The result is to defeat regulation by frustrating the necessary close supervision over rates in rela-

tion to costs and to upset settled practices upon which the operations of the regulated companies are based. The decision below disregards the considered judgment of the parties and the Federal Power Commission as to the meaning of the filed and posted tariff and service agreement structure developed by the Commission with general acceptance over a term of years. It introduces such difficulty and embarrassment into the administration of the Natural Gas Act as to call for early revision by this Court by writ of certiorari.

Respectfully submitted,

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*Of Counsel*

New York, December 26 1957

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DEC 27 1957

JOHN T. PEY, Clerk

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1957

No. ~~684~~ 23

UNITED GAS PIPE LINE COMPANY,  
*Petitioner,*  
*vs.*

MEMPHIS LIGHT, GAS AND WATER DIVISION;  
CITY OF MEMPHIS, TENNESSEE; MISSISSIPPI  
VALLEY GAS COMPANY; TEXAS GAS TRANS-  
MISSION COMPANY; SOUTHERN NATURAL  
GAS COMPANY; and FEDERAL POWER COM-  
MISSION,

*Respondents.*

**APPENDIX TO PETITION FOR  
WRIT OF CERTIORARI**

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**Opinion of United States Court of Appeals for District  
of Columbia Circuit November 21 1957**

**United States Court of Appeals**

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 13,666**

**MEMPHIS LIGHT, GAS AND WATER DIVISION; CITY OF MEM-  
PHIS, TENNESSEE; AND MISSISSIPPI VALLEY GAS COM-  
PANY, PETITIONERS,**

**v.**

**FEDERAL POWER COMMISSION, RESPONDENT,  
UNITED GAS PIPE LINE COMPANY; TEXAS GAS TRANSMISSION  
CORPORATION; and SOUTHERN NATURAL GAS COMPANY,  
INTERVENORS.**

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**On Petition for Review of Orders of the  
Federal Power Commission**

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**Decided November 21, 1957**

*Mr. Reuben Goldberg*, for all petitioners. *Mr. George E. Morrow*, a member of the bar of the Supreme Court of Tennessee, *pro hac vice*, by special leave of Court, also argued for petitioners Memphis Light, Gas and Water Division and The City of Memphis, Tennessee.

*Mr. Robert M. Weston*, Attorney, Federal Power Commission, with whom *Messrs. Willard W. Gatchell*, General Counsel, Federal Power Commission, and *Howard E. Wahrenbrock*, Solicitor, Federal Power Commission, were on the brief, for respondent.

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**Mr. Thomas Fletcher**, with whom **Mr. C. Huffman Lewis** was on the brief for intervenor, **United Gas Pipe Line Company**.

**Mr. Christopher T. Boland** with whom **Messrs. Richard J. Connor** and **Thomas F. Brosnan** were on the brief, for intervenor, **Texas Gas Transmission Corporation**.

**Mr. William S. Tarver** for intervenor, **Southern Natural Gas Company**.

Before **BAZELON**, **WASHINGTON** and **BASTIAN**, Circuit Judges.

**WASHINGTON, Circuit Judge:** This case concerns the interpretation to be given the Supreme Court's decision in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332 (1956). The chief question is whether the rule of that case applies where—as here—the controlling supply contracts pledge payment under designated rate schedules “or any effective superseding rate schedules.”

I.

Petitioners seek review of an order of the Federal Power Commission denying their motions to reject new rate schedules filed by the intervenor **United Gas Pipe Line Company** (**United**). **United** sought to increase the prices at which it was obligated by contract to sell gas to the intervenors **Texas Gas Transmission Corporation** (**Texas Gas**) and **Southern Natural Gas Company** (**Southern Natural**), and also to petitioner **Mississippi Valley Gas Company** (**Mississippi**). Also denied by the Commission were petitioners' motions to prohibit the new rates from becoming effective and to require appropriate refunds by **United**.

Intervenor **United** is a “natural-gas company” within the meaning of the Natural Gas Act, 52 STAT. 821, 15 U. S. C.

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§ 717a (1952), whose sales are subject to the jurisdiction of the Federal Power Commission. Petitioner Memphis Light, Gas and Water Division is a gas distribution agency of petitioner City of Memphis, Tennessee. The interests of the City of Memphis and of the Division are identical; hereafter both will be referred to jointly as "Memphis." Memphis obtains all of its gas supply from intervenor Texas Gas. The latter, a pipeline company, in turn obtains a substantial part of its supply from United. Petitioner Mississippi is a gas distribution system. It obtains some of its supply by purchase directly from United. It also is supplied by Texas Gas and by Southern Natural. Southern Natural, like Texas Gas, obtains a substantial part of its supply from United.

Thus, United has direct seller-buyer relationships with Mississippi, Texas Gas and Southern Natural. United has no such relationship with Memphis, which buys only from Texas Gas. Texas Gas, a customer of United, has seller-buyer relationships with both Memphis and Mississippi. Southern Natural, also a customer of United, has a seller-buyer relationship with Mississippi only. The supply arrangements between the parties are governed by long-term service agreements (contracts).

On September 30, 1955, the Commission accepted United's new schedules for filing under Section 4(d) of the Natural Gas Act, 15 U. S. C. § 717c(d) (1952). The level of these new rates had not been agreed to by United's contract customers. Acting under Section 4(e), the Federal Power Commission suspended the operation of the new schedule for non-industrial sales and ordered a hearing on the lawfulness of the new schedule. These hearings were held, with Memphis as an intervenor therein, but are not involved in the present review.

In February, 1956, while the Section 4(e) hearings were in progress, the Supreme Court announced its decision in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, *supra*, holding that a gas seller could not unilaterally increase its

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contract rates for gas. Petitioners thereupon filed with the Federal Power Commission motions to prohibit United's new rates from becoming effective on April 1, 1956,<sup>1</sup> to reject those increases, and to order appropriate refunds. Their position was that United's filing was a unilateral attempt to increase rates and that the Federal Power Commission had no jurisdiction to process such an application under Section 4(e), as construed in *Mobile*. See also *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U. S. 848 (1956). The Commission heard argument and on October 2, 1956, denied the motions in an opinion and order. Rehearing was denied on November 23, 1956. Petitioners now seek review of those orders.

## II.

At the outset the Federal Power Commission urges that the orders here under review are interlocutory and not presently subject to our scrutiny. Of the intervenors only United joins in this attack; it urges in addition that petitioners, as strangers to the contracts here involved, are not "aggrieved" under Section 19(b) of the Act, 15 U. S. C. § 717r(b) (1952).

The aggrievement issue is readily answered insofar as petitioner Mississippi is concerned. Mississippi is a party to three of the contracts here involved as a direct customer of United. And United is, in the proceeding here under review, seeking to increase the cost of gas to its direct contract purchaser Mississippi. As to Memphis the situation is somewhat different. Memphis is not a direct customer of United. Rather it purchases from Texas Gas. But the Federal Power Commission has already approved an agreement between Texas Gas and Memphis whereby Texas Gas, customers will

<sup>1</sup>April 1, 1956, is five months after November 1, 1955. November 1, 1955, is thirty days after the new schedules were filed. See Natural Gas Act § 4(d), (e), 15 U. S. C. 717c(d), (e) (1952).

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reimburse it for any increase in gas cost as a result of the hearings now in progress. Docket No. G-2017, 14 F. P. C.— (1955); see F. P. C. orders at 20 FED. REG. 8088, 8977 (1955). Because of this F. P. C.-approved agreement, Memphis will feel the immediate impact of any increase awarded. This immediate impact is sufficient to give Memphis standing. See *City of Pittsburgh v. Federal Power Commission*, 99 U. S. App. D. C. 113, 237 F. 2d 741 (1956); *National Coal Ass'n. v. Federal Power Commission*, 89 U. S. App. D. C. 135, 191 F. 2d 462 (1951). No further action of the Commission is necessary to make operative the increased cost to Memphis. Cf. *California Oregon Power Co. v. Federal Power Commission*, 99 U. S. App. D. C. 263, 239 F. 2d 426 (1956); *Cincinnati Gas & Electric Co. v. Federal Power Commission*, — U. S. App. D. C.—, 246 F. 2d 688 (1957).

United's and the Commission's contentions that the orders here under review are interlocutory and that therefore we have no jurisdiction are without merit. Suffice it to say that this case is presented to us in substantially the same posture in which the *Mobile* case was presented to the Third Circuit and to the Supreme Court. See *Mobile Gas Service Corp. v. Federal Power Commission*, 215 F. 2d 883, 885 (3d Cir. 1954), aff'd sub nom. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332 (1956); see also *Tyler Gas Co. v. Federal Power Commission*, — U. S. App. D. C.—, — F. 2d — (decided August 1, 1957).

### III.

This case is, in every pertinent aspect save one, a close copy of *Mobile*. That single aspect is the presence in the contracts here involved of the following provision:<sup>2</sup>

<sup>2</sup>There is some dispute among the parties as to whether three of the contracts contain the quoted contract provision. For present purposes we will accept the Commission's representation in its brief that all of the contracts contain the disputed clause or its equivalent.

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**"All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule [here is inserted the appropriate rate schedule designation], or any effective superseding rate schedules, on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached thereto and filed with the Federal Power Commission which are by reference made a part hereof." (Emphasis added.)**

**In *Mobile*, the Court stated at the outset that—**

**"The question presented in this case is whether under the Natural Gas Act, 52 Stat. 821, 15 U. S. C. § 717 *et seq.*, a regulated natural gas company furnishing gas to a distributing company under a long-term contract may, without the consent of the distributing company, change the rate specified in the contract simply by filing a new rate schedule with the Federal Power Commission." 350 U. S. at 333-34.**

**The Supreme Court answered in the negative. In the present case, the question is whether the contract clause quoted above provides the "consent" necessary to give the Federal Power Commission jurisdiction to review under Section 4(e) of the Act United's new schedule filed under Section 4(d).**

**The Commission found that the phrase "any effective superseding rate schedules" did provide the consent required by *Mobile* and**

**"that it was the understanding and intent of the contracting parties [as expressed in the above-quoted contract clause] to grant United the power to make changes in rates pursuant to section 4(d) of the Natural Gas Act, without waiver, however, of the right of the purchasers to oppose such changes in proceedings before the Commission for the purpose of testing the reasonableness and justness thereof. . . . United's proposal for increased rates in this**

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proceeding does not constitute a prohibited unilateral change of a contract, for the contract language supplies the purchaser's assent to United's filing of a change in rates."

In effect, the Commission's position is that the contractual consent to the *act of filing* is sufficient for Section 4(d). Correct though the Commission's statement of the parties' intent may be, it does not answer the question whether the Commission has jurisdiction to accept such a schedule for filing and to proceed under Section 4(e) to review United's filing of a new rate, where the level of the new rate itself has not been previously agreed upon by the parties to the contract. We know as a fact that not only Mississippi but Texas Gas and Southern Natural as well have not consented to the amount of the new rate, since all three of them are now opposing United's increase before the Commission.

#### IV.

The Supreme Court's opinion, in describing the relation of Sections 4 and 5, stated clearly that Section 4(d) was merely a requirement that the Federal Power Commission and the public be formally notified of any change made in any contract for the sale of gas by a natural gas company. 350 U. S. at 339. The notice contemplated by Section 4(d) is notice of the fact that the contracting parties have reformed their contract: that the seller has offered, and the buyer has agreed to, a particular new price to be effective no less than thirty days after the Commission is notified of the change. 350 U. S. at 339-40. It is only at this point—*after* the parties have negotiated privately a new price term—that the Commission, under Section 4(d) and (e), in any way becomes involved with the rate changing process. Nothing in Section 4(e) gives the Commission authority to assist the parties in negotiating a new price term.

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Under the rule in *Mobile*, for the Commission to review rates under the more expeditious procedure of Section 4(e), the seller must bring to the Commission a negotiated agreement. And that agreement to the new rate must be as specific in its terms as was the previous contractual agreement to the rate schedule sought to be superseded. See 18 C. F. R. Pt. 154. If such a new rate schedule has been properly agreed upon and is filed pursuant to Section 4(d), the Federal Power Commission may then under Section 4(e) undertake to review the new rate by ordering a hearing on the "lawfulness" of the new rate filing; and the Commission may suspend temporarily the non-industrial part of the new rate. To the extent that the Federal Power Commission is convinced by the filing company that the new rate is neither unjust nor unreasonable, that new rate may be approved, or a lower rate may be approved, or the new rate may be found unlawful in its entirety and, if necessary, appropriate refunds may be ordered.

To quote *Mobile*:

"The relationship of these sections [§§ 4, 5] thus affords no support to petitioners' characterization of §4(d) and (e) as establishing a rate-changing 'procedure'—a 'proceeding' before the Commission 'initiated' by a natural gas company filing a 'proposed change. Section 4(d) provides not for the filing of 'proposals' but for notice to the Commission of any 'change...made by' a natural gas company, and the change is effected, if at all, not by an order of the Commission but solely by virtue of the natural gas company's own action. If the purported change is one the natural gas company has the power to make, the 'change' is completed upon compliance with the notice requirement and the new rate has the same force as any other rate—it can be set aside only upon being found unlawful by the Commission. It is thus no more a 'proposed' rate than any other rate, all of which are equally subject to Commission review. Likewise, no 'proceeding' is 'initiated' by a §4(d) filing. A

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proceeding to review the new rate may be initiated under §4(e), but, if so, it is initiated by the Commission in the same manner as a proceeding under §5(a) to review any other rate, that is, upon complaint or its own motion." 350 U. S. at 342.

V.

For these reasons, we hold that since United had not obtained the consent of its contract customers to the rate itself—albeit some of those customers may have consented to the act of filing—the Federal Power Commission had no power to file the new rate schedules under Section 4(d) and therefore could not review the new rate pursuant to Section 4(e). It is not sufficient for a Section 4(d) filing that United's customers have consented to allow United to have the Commission invoke Section 4(e) to review a rate increase during the contract term, where the parties have not agreed to the specific rate. Doubtless the contracting parties could have agreed on a third party to arbitrate a dispute when the seller sought to raise its price. But the Federal Power Commission has not been given that arbitration function by statute.

Again to quote *Mobile*:

"These sections [§§ 4, 5] are simply parts of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful. The Act merely defines the review powers of the Commission and imposes such duties on natural gas companies as are necessary to effectuate those powers; it purports neither to grant nor to define the initial rate-setting powers of natural gas companies.

"The powers of the Commission are defined by §§ 4(e) and 5(a). The basic power of the Commission is that given it by § 5(a) to set aside and modify any rate or contract which it determines, after hearing, to be 'unjust, unreasonable, unduly discrimina-

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tory, or preferential.' This is neither a 'rate-making' nor a 'rate-changing' procedure. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them. Section 5(a) would of its own force apply to *all* the rates of a natural gas company, whether long-established or newly changed, but in the latter case the power is further implemented by § 4(e). All that § 4(e) does, however, is to add to this basic power, in the case of a newly changed rate or contract (except 'industrial' rates), the further powers (1) to preserve the status quo pending review of the new rate by suspending its operation for a limited period, and (2) thereafter to make its order retroactive, by means of the refund procedure; to the date the change became effective. The scope and purpose of the Commission's review remain the same—to determine whether the rate fixed by the natural gas company is lawful." 350 U. S. at 341.

The contracting parties cannot, of course, vest the Federal Power Commission with power not given to that body by Congress.<sup>3</sup>

<sup>3</sup>Judge Bazelon and the present writer, speaking only for ourselves, wish to add that in our view acceptance of the position of the Commission and the intervenors in this case would be to give approval to a ready means of debilitating Section 5(a). That section contemplates, *inter alia*, that a natural gas company, claiming that its rates are too low, may seek to have the Federal Power Commission hold a hearing to review its present rates. In that hearing, a record must be made on which the Commission can decide whether the present rates are "unjust, unreasonable, unduly discriminatory, or preferential." And if the rates, after hearing, are found to be too low the Commission may order the rates increased to a lawful level. Respondent and intervenors would have us hold that the natural gas company seeking an increase could avoid that statutory scheme by securing its customer's consent merely to the act of filing, and with such consent be entitled to Commission review under Section 4(e). By using the Section 4(e) procedures the company could get its rates into effect quickly and would avoid both the delay and the

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From this discussion it follows that we must reverse and remand this case to the Federal Power Commission for further proceedings not inconsistent with this opinion, and with directions to reject the schedules filed by United and to initiate such proceedings as may be necessary to secure refunds of the incremental amounts paid to United since the time that those schedules were erroneously allowed to become effective.

*So ordered.*

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more stringent proof requirements of Section 5(a). In the Section 4(e) hearing, according to respondent and intervenors, the filing party would merely be required to show that the new rate—a rate to which, by hypothesis, its customers had *not* consented—is one which is not unlawful, *i.e.*, that it is a rate within a zone of reasonableness, *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246, 251 (1951); *Sierra Pacific Power Co. v. Federal Power Commission*, 96 U. S. App. D. C. 140, 142, 223 F. 2d 605, 607 (1955), without reference to the lawfulness or adequacy of the old rate. In a Section 5(a) hearing, however, a record would have to be made showing not only that the new rate was lawful, but that the old rate was “unjust, unreasonable, unduly discriminatory, or preferential.” And under Section 5(a) if the new, non-consented rate, or any part of it, were approved, it would not become effective until after the hearing was concluded and the increase ordered formally by the Commission. The company awarded the increase would, in addition, have to file under Section 4(d) a new schedule reflecting the rate awarded.

**Judgment of Court of Appeals Thereon  
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**UNITED STATES COURT OF APPEALS**

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**OCTOBER TERM, 1957** . . . . .

**No. 13,866**

**MEMPHIS LIGHT, GAS AND WATER DIVISION; CITY OF MEMPHIS, TENNESSEE; AND MISSISSIPPI VALLEY GAS COMPANY, PETITIONERS,**

**v.**

**FEDERAL POWER COMMISSION, RESPONDENT,**

**UNITED GAS PIPE LINE COMPANY; TEXAS GAS TRANSMISSION CORPORATION; and SOUTHERN NATURAL GAS COMPANY, INTERVENORS.**

**On Petition to Review of Orders of the  
Federal Power Commission**

**Before: Bazelon, Washington and Bastian, Circuit Judges.**

**Judgment**

This case came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the orders of the said Federal Power Commission on review herein be, and they are hereby, reversed, and that this case be, and it is hereby, remanded to the Federal Power Commission for further proceedings not inconsistent with the opinion of this Court, and with directions to reject the schedules filed by United Gas Pipe Line Company and to initiate such proceedings as may be necessary to secure refunds of the incremental amounts paid to United Gas Pipe Line Company since the time that those Schedules were erroneously allowed to become effective.

**Dated: Nov. 21, 1957**

**Per Circuit Judge Washington.**

**Opinion No. 295 of Federal Power Commission October  
2 1956 Denying Intervenor's (Respondents' Here)  
Motions to Reject Filings (16 FPC 19)**

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**UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION**

**Opinion No. 295**

**Docket No. G-9547**

**In the Matter of  
UNITED GAS PIPE LINE COMPANY**

**Opinion and Order Denying Motions**

**(Issued October 2, 1956)**

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**(Issued October 2, 1956)**

On September 30, 1955, United Gas Pipe Line Company (United) filed revised sheets to its FPC Gas Tariff, to become effective November 1, 1955, providing, among other things, increased rates for sales of natural gas subject to the jurisdiction of the Commission. The Commission, by order issued October 26, 1955, suspended until April 1, 1956, all of such revised tariff sheets, except those covering the sale of gas for resale for industrial use only.

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Hearings in respect to these increased rate proposals were commenced on January 6, 1956, but have not been concluded. United has, however, presented its complete case in direct support of the increased rates which are herein involved and the cross-examination of all but one of United's witnesses has been completed.

Pursuant to appropriate motion of United, the suspended tariff sheets became effective as of April 1, 1956.

Mississippi Valley Gas Company (Mississippi Valley), Memphis Light, Gas and Water Division jointly with the City of Memphis, Tennessee (Memphis), and the City of Jackson, Mississippi, active participants in this proceeding, filed, respectively, on March 22 and 28, and April 2, 1956, motions<sup>1</sup> to (a) prohibit United's increased rates from becoming effective April 1, 1956, (b) reject in part such increased rates, and (c)

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order refunds under United's increased industrial use rates which were not suspended and which therefore became effective on November 1, 1955. These several motions are based on the allegation that United's tariff filings of September 30, 1955, constituted unilateral changes in the "contractual rate" which are prohibited by the decision in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332.

United filed, on March 28 and April 6 and 9, 1956, answers to the above motions, alleging, *inter alia*, that (a)

<sup>1</sup>Mississippi Valley's motion is limited to United's increased rates insofar as they apply to Mississippi Valley's own purchases and those of its other suppliers, Texas Gas Transmission Corporation and Southern Natural Gas Company. Memphis' motion is limited to the increased rates to its supplier, Texas Gas, and that of the City of Jackson to the increased rates to its supplier, Mississippi Valley.

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its service agreements with these movants grant either party the right to seek changes in accordance with the Natural Gas Act; and (b) the tariff, including the form of service agreement, is *ex parte* and may be changed unilaterally. Southern Natural Gas Company (Southern Natural), on March 30, 1956, and Texas Gas Transmission Corporation (Texas Gas), on April 2 and 5, 1956, filed answers in support of United's position that "mutual consent" to changes in rates was contemplated by and provided for in United's service agreements with them.

Mississippi Valley, on April 9, 1956, filed "Answer to Motion of United Gas Pipe Line Company to Dismiss Motion of Mississippi Valley Gas Company to Reject, Cancel and Dismiss Rate Filings in Part." Memphis filed a similar answer on April 16, 1956. United, in turn, filed replies on April 19 and 20, 1956, respectively, to the "Answers" of Mississippi Valley and Memphis.

Willmut Gas and Oil Company (Willmut), on the basis of the *Mobile* case, *supra*, and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U. S. 348, filed, on April 13, 1956, its motion to (a) reject United's increased rates as to Willmut, (b) prohibit their becoming effective, and (c) require the refund of the increase in rates already paid by Willmut to United. Willmut's motion was answered by United on April 23, 1956.

Mobile Gas Service Corporation (Mobile Gas), which had theretofore filed its Petition of Intervention and Answer in opposition to the filing of United for increased rates, filed, on April 13, 1956, an amendment to its said petition, whereby, in reliance upon the decision in the *Mobile* case, it sought to fortify its position. This filing by Mobile Gas is tantamount to a motion to reject United's increased rates as to it. United filed an answer to the amendment of Mobile Gas on April 23, 1956.

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There is also outstanding a joint petition by Tyler Gas Company (Tyler Gas) and the City of Tyler, Texas (Tyler), filed October 21, 1955, in this proceeding, for an order rejecting United's increased rates as to Tyler Gas Company. In their petition Tyler Gas and Tyler placed reliance upon the *Mobile* and *Sierra* cases, then before the Supreme Court on appeal, in support of the petition for rejection. On October 26, 1955, United filed a motion to dismiss and answer to this joint petition. By

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letter, dated March 26, 1956, after decisions in the *Mobile* and *Sierra* cases, counsel for Tyler renewed its prior contention as to the illegality of United's increased rates which are the subject of the proceedings in Docket No. G-9547, as well as United's rates involved in the proceedings in Docket Nos. G-2019 and G-2210.

Oral argument was heard by the Commission on May 25, 1956, on the aforesaid several motions and answers.

Although Tyler Gas and Tyler participated in such argument in the proceedings in Docket No. G-9547, further argument was had before the Commission on July 13, 1956, on the petition filed by Tyler Gas and Tyler in that proceeding—and upon similar motions and petitions filed by these parties in the proceedings in Docket Nos. G-2210 and G-10592. We have separately considered these several motions and petitions of Tyler Gas and Tyler and a separate order disposing of them is being issued concurrently herewith. Accordingly, in this instant order we shall not give further consideration to the petition of these parties filed in Docket No. G-9547.

The several movants herein premise their motions solely upon the decisions of the Supreme Court in the *Mobile* and *Sierra* cases. In those cases, the Court had before it the narrow question of the right of a natural-gas company

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or a public utility by unilateral action to change a definite and specific rate fixed for a definite and specific term of years by contractual agreement. The Court stated the question presented in the *Mobile* case specifically as follows:

"The question presented in this case is whether under the Natural Gas Act, . . . a regulated natural gas company furnishing gas to a distributing company under a long-term contract may, without the consent of the distributing company, change the rate specified in the contract simply by filing a new rate schedule with the Federal Power Commission."

The Court held that a specific contract rate so fixed could not be changed by a unilateral filing pursuant to section 4(d) of the Natural Gas Act.

In the *Mobile* case, the rate for the gas was specifically stated and firmly fixed for the full 10-year term of the contract. Nothing was contained in the contract under scrutiny in that case which indicated either directly or by implication that the rate could be changed by unilateral action of United. It was a static rate for 10 years, and, unless the purchaser consented to a change in the rate, United was bound by obligations of the contract. Such was the view of the Supreme Court on the facts in the *Mobile* case.

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In its opinion in the *Mobile* case the Supreme Court stated:

"Section 4(d) [of the Natural Gas Act] provides not for the filing of 'proposals' but for notice to the Commission of any 'change . . . made by' a natural

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gas company . . . . If the purported change is one the natural gas company has the power to make, the 'change' is completed upon compliance with the notice requirement and the new rate has the same force as any other rate—it can be set aside only upon being found unlawful by the Commission."

Elsewhere the Court recognized the powers of the Commission under section 4(e) of the Act—

"... (1) to preserve the status quo pending review of the new rate by suspending its operation for a limited period and (2) thereafter to make its order retroactive, by means of the refund procedure, to the date the change became effective."

After careful consideration of the record herein—particularly the agreements between United and its customers, including the several petitions and motions, the answers thereto and the arguments in support thereof, we are of the opinion that the rate filing by United, which is the subject of this proceeding, is one which United had the right and power to make pursuant to the provisions of section 4(d) of the Natural Gas Act. Accordingly, this proceeding was properly instituted pursuant to section 4(e) of the Act. We are of the further opinion that the decision of the Supreme Court in the *Mobile* case does not require a contrary conclusion. Rather, we conclude that the filing of United and this proceeding relating thereto are wholly consistent with the holdings of the Court in that case and in the *Sierra* case.

As noted before, the increased rates, which are the subject of this proceeding—and the target of the motions and petitions here involved—were filed by United on September 30, 1955. Our concern, therefore, is with the service agreements (contracts) between United and its

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customers as in effect at that date<sup>2</sup> and whether thereunder United had the "power to make" the change in rates.

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The provisions of the several service agreements between United, as seller, and Mississippi Valley, Southern Natural, Texas Gas, and Willmut, as purchasers, are materially different from the aforementioned agreement between United and Mobile which was the subject of consideration by the Supreme Court in the *Mobile* case. Unlike the contract between Mobile and United which was before the Court, the pertinent agreements between United and Mississippi Valley, Southern Natural, Texas Gas and Willmut, as in effect on September 30, 1955, do not fix an absolute or static rate. Rather, these latter agreements simply provide that the rate to be charged shall be the effective rate on file from time to time with the Commission.

The pricing provision in United's standard form of service agreement, as contained in its tariff, which is the form of agreement between United and these purchasers, reads as follows:

"All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedules [here is inserted the designation of the appropriate schedules as contained in the filed tariff], or any effective superseding rate schedules, on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate

<sup>2</sup>The pertinent agreement with Mississippi Valley is dated March 25, 1955; Mobile's agreement is dated January 1, 1936, as amended; Southern Natural's are dated May 7, 1951, and September 30, 1952; Texas Gas agreements are dated April 16, 1945, and August 11, 1952; and the several agreements of Willmut are dated September 7, 1954, February 28, 1955 and May 6, 1955.

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schedules and to the General Terms and Conditions attached thereto and filed with the Federal Power Commission which are by reference made a part hereof."

The words "or any effective superseding rate schedules on file with the Federal Power Commission" clearly contemplate the understanding and intent of the contracting parties that changes could properly be made by United in the rates contained in the applicable rate schedules in effect at the time of execution of the service agreement. It is equally clear that it was the understanding and intent of the parties that the purchaser would pay the rates set out in the applicable rate schedules effective from time to time and that changes could be made therein by United under the procedures established under section 4 of the Act. This is the only reasonable interpretation that can be given to the above-quoted contract provision as an expression of the intent of the contracting parties. Otherwise the quoted phrases are meaningless and surplusage. But contracts—like statutes—will and must be read to give meaning to the whole, and are presumed to fully express the intent of the parties.

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It follows too that the changes contemplated by the agreements were unilateral changes to be proposed by United. The purchasers, although having a right to file a complaint against the rates being charged, have no correlative right under the statute to file a schedule of proposed changes in the seller's rates. This is a right reserved to the natural-gas company providing the service. Knowledge of these facts must be attributed to the parties to the agreements.

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Unless the language of the agreements be interpreted as we have, it can only be concluded that by such language the parties intended merely that the first effective rates would continue in effect until changed by the Commission under the provisions of section 5(a) of the Natural Gas Act. Such an interpretation, however, would imply that the parties were merely agreeing to comply with the Act, and the orders of the Commission thereunder. Since they are under obligation to so comply and subject to penalties if they do not, such an interpretation would deprive the contractual provisions of meaning and substance. This would be improper and should not be done.

At the time of the filing by United on September 30, 1955, of the increased rates and charges which are the subject of this proceeding there was in effect a so-called "pre-existing contract" between United and Mobile, dated January 1, 1936, which had been amended by a number of supplemental agreements. This contract, as particularly amended by a supplemental agreement dated July 30, 1946, was the subject of the Court's consideration in the *Mobile* case. However, prior to the subject filing by United, Mobile and United on June 6, 1955, entered into a fully superseding agreement. This new agreement was in the standard form of service agreement, as set forth in United's tariff and containing the language heretofore discussed.

Although dated June 6, 1955, the superseding agreement of Mobile and United did not become effective until February 8, 1956, upon the completion by United of certain additional facilities necessary to provide Mobile the additional and expanded service contemplated by the new contract. The fact that this agreement did not actually become operative until after United's filing of September 30, 1955, does not affect at all the views heretofore expressed as to the apparent

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understanding and intent of the contracting parties entering into this standard form of service agreement. Actually, this purpose and intent

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is even more deliberately indicated by the actions of Mobile. Not only did Mobile enter into the above-mentioned agreement of June 6, 1955, prior to United's filing, but, on November 10, 1955—subsequent to United's filing—Mobile entered into a new agreement containing the identical pricing provision heretofore quoted, which is standard in the tariff form of service agreement. It is even more significant that on July 2, 1956—after the decision of the Supreme Court in the *Mobile* case and after the arguments before us on the several petitions and motions here involved (in which Mobile did not participate)—Mobile entered into a new agreement with United which supersedes all prior agreements. This latest—and presently effective contract between Mobile and United—like the prior agreements of June 5 and November 10, 1955, clearly evidences the intent, purpose and agreement of the parties that United should have the power to make filings with the Commission of changes in the rates and charges in effect from time to time.

In addition to the previously mentioned agreement in standard tariff service agreement form, United and Texas Gas also have an effective so-called "pre-existing contract", which, pursuant to section 154.85 of the Commission's Regulations Under the Natural Gas Act, has been restated. The basic contract, dated April 16, 1945 (United's Rate Schedule FPC No. 78-A), provided for a base price of 8 cents per Mcf, with a provision for adjustment in the event of an increase or decrease in taxes related to the production or sale of gas.

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However, on the same date, April 16, 1945, United, by unilateral action—without written concurrence of the other party—advised by letter that it would accept a base price of 5.7 cents per Mcf, with a provision for adjustment in the event of an increase or decrease in taxes related to the production or sale of gas. So far as this record shows, Texas Gas continued to pay the rates provided in the contract of April 16, 1945, as so amended, until August 3, 1952, when United's conversion tariff, submitted in compliance with the Commission's Order No. 144, Docket No. R-107, became effective. (Order No. 144 added sections 154.1-154.86 to the Commission's Regulations Under the Natural Gas Act [18 CFR 154.1-154.86]). The conversion tariff so filed occasioned a change in the rates previously paid United by Texas Gas. Since that time Texas Gas has continued to pay—without protest—the rates provided in the applicable rate schedules effective from time to time as filed with the Commission.

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Further, there is to be considered the actions of the parties under the contracts. Excepting only the action of Mobile under a prior and superseded contract, which was the subject of the Supreme Court's decision in the *Mobile* case cited before, and the petition of Tyler Gas and Tyler, which is the subject of a separate consideration and order, not one of the many purchasers under contracts with United contended prior to the decision in the *Mobile* case that the rate filing of United here under consideration—or any prior change in rates—was in contravention of the provisions of the contract. Nor did they contend that United did not have the right under their several contracts to make a unilateral

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change in the first effective price thereunder—or that the changes made were contrary to the purpose and language of the contracts. Since each customer was directly informed of United's filing now under consideration, as well as previous rate increase filings, and Mobile and Tyler Gas were the only customers who, prior to the *Mobile* decision, contended that such changes were contrary to the terms of their agreements with United, it can only be concluded that all other customers were of the belief that their agreements gave United the power to make unilateral changes in the existing rates.

This view is supported by Southern Natural and Texas Gas. These two customers, both in their answers in support of the position of United in this instant matter and in oral argument before us, have stated that it was the understanding and intent of the contracting parties to grant United the power to make changes in rates pursuant to section 4(d) of the Natural Gas Act, without waiver, however, of the right of the purchasers to oppose such changes in proceedings before the Commission for the purpose of testing the reasonableness and justness thereof. And these parties, as well as practically all other customers of United, have acted through the years in accordance with this contractual purpose and intent.

Section 235(e) of the Restatement of the Law of Contracts states that:

“If the conduct of the parties subsequent to a manifestation of intention indicates that all the parties placed a particular interpretation upon it, that meaning is adopted if a reasonable person could attach it to the manifestation.”

With only four recent exceptions, all of United's customers have given a uniform interpretation to the price provision

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of United's service agreement form—and their conduct has been in accord therewith.

The instant complaints of Mississippi Valley, Memphis Light, Gas and Water Division, and the City of Memphis with respect to the contracts of their suppliers, Southern Natural and Texas Gas, with United presents an anomalous situation. The contracting parties are in complete agreement as to the meaning and purpose of their contracts. Yet, these third parties—

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these strangers to the contracts—seek to impose upon the contracting parties a construction of the contracts which is wholly opposed to the purpose and intent of the contracting parties and the language of the contracts. We recognize that there is serious question as to the standing of these strangers to the contracts to challenge the provisions thereof and the conduct of the parties thereunder, but even if they do have standing to challenge the contracts of others their contentions are without merit and not supported.

Under the *Mobile* and *Sierra* decisions, parties may still agree between themselves to the filing of changes in rates such as proposed by United in this proceeding. There is no interdict in either the *Mobile* or the *Sierra* cases against such an agreement between the parties. The above-quoted language from United's service agreements with the movants and others clearly indicates that mutual consent is provided in the service agreement to the filing by United for a change in rates and charges, pursuant to section 4 (d) of the Natural Gas Act. The service agreements provide that the rates on file shall be the effective rates. United's proposal for increased rates in this proceeding does not constitute a pro-

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hibited unilateral change of a contract, for the contract language supplies the purchaser's assent to United's filing of a change in rates.

**The Commission further finds:**

No good cause exists for the Commission to grant the motions filed herein by Mississippi Valley Gas Company, Memphis Light Gas and Water Division and the City of Memphis, Tennessee, the City of Jackson, Mississippi, Willmut Gas and Oil Company, or to grant the request of Mobile Gas Service Corporation, styled an Answer and Amendment thereto, which in effect constitutes a motion to reject.

**The Commission orders:**

The aforesaid motions filed herein by Mississippi Valley Gas Company, Memphis Light, Gas and Water Division and the City of Memphis, Tennessee, the City of Jackson, Mississippi, Willmut Gas and Oil Company, and the Answer and Amendment to Answer, which constitutes a motion to reject, filed herein by Mobile Gas Service Corporation, be and they are each hereby denied.

**By the Commission. Commissioner Kline not participating.**

**LEON M. FUQUAY,  
Leon M. Fuquay,  
Secretary.**

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Denying Rehearing**

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UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION

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Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck, William R. Connole and Arthur Kline.

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Docket No. G-9547

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In the Matter of

UNITED GAS PIPE LINE COMPANY

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**Order Denying Applications for Rehearing**

(Issued November 23, 1956)

Mississippi Valley Gas Company, the City of Memphis, and the Memphis Light, Gas and Water Division, jointly (Joint Applicants), and Willmut Gas and Oil Company (Willmut), filed on October 26, 1956, applications for rehearing of the Commission's Opinion No. 295, and accompanying order, issued October 2, 1956.

Willmut alleges certain specifications of error, which are essentially the same as those heretofore alleged in its motion which was a subject of consideration in said opinion and order. In support of its application, Willmut relies upon the arguments made in the aforementioned motion and a brief previously filed in support thereof. The points of alleged error do not present any issues which have not been heretofore fully considered by the Commission. We

**Federal Power Commission Order November 23 1956**  
**Denying Rehearing**

find nothing in the application for rehearing which justifies or requires a disposition of these issues in a manner other than that heretofore made in our Opinion No. 295 and accompanying order.

Similarly the application for rehearing filed by the Joint Applicants, while alleging that the Commission erred in certain specific findings and conclusions expressed in the Opinion No. 295 and order, is based upon contentions which are essentially the same as those specifically dealt with in said opinion and order in the disposition of the issues raised by the several pleadings of these Joint Applicants heretofore considered in this proceeding. Accordingly, we do not find it necessary to review herein the findings and conclusions expressed in the opinion and order. Nor do we find anything in this joint application which justifies or requires a change in the views set forth in the opinion and order.

The Commission finds:

- (1) The applications for rehearing of our Opinion No. 295 and accompanying order issued on October 2, 1956, set forth no new facts and no principles of law which either were not fully considered by the

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Commission when it adopted said opinion and order or which having now been considered warrant any change in or modification of such order. All contentions and objections not specifically discussed herein have been considered and found either without basis in law or support in fact, but are not sufficiently material to warrant individual treatment or have been adequately disposed of otherwise.

- (2) Apart from our consideration of the applications for rehearing, further consideration of said Opinion No. 295 indicates that it should be amended as hereinafter ordered to include an omission therefrom.

**Federal Power Commission Order November 23 1956**  
**Denying Rehearing**

**The Commission orders:**

- (A) The aforementioned Opinion No. 295, as issued on October 2, 1956, is hereby amended to add the following, which shall follow page 7 thereof (mimeo. ed.):

"In addition to the standard form of service agreement, dated September 30, 1952, between United and Southern Natural Gas Company, which has been previously discussed, there was also in effect on September 30, 1955, another agreement between United and Southern Natural, dated May 7, 1951. The latter is also a so-called 'pre-existing contract' covering the sale of gas produced in the Carthage (Texas) Field and in the Floyd Field in Louisiana, which, pursuant to section 154.85 of the Commission's Regulations, has been restated. So far as this record shows, Southern Natural continued to pay the rates and charges provided in the contract of May 7, 1951, until August 3, 1952, when United's conversion tariff, submitted in compliance with the Commission's Order No. 144, Docket No. R-107, became effective. The conversion tariff so filed occasioned a change in the rates previously paid United by Southern Natural under this contract. Since that time Southern Natural has continued to pay the rates provided in the applicable rate schedules effective from time to time as set forth in United's FPC Gas Tariff filed with the Commission.

"The contract of May 7, 1951, between United and Southern Natural was superseded in its entirety by a new agreement between these parties, dated November 1, 1955, which is in United's standard form of service agreement and contains the standard pricing provision heretofore discussed. The agreement of November 1, 1955, was subsequently superseded by the presently effective agreement between these parties dated March 8, 1956, which is also in the standard form of United and contains the standard pricing provision."

**Federal Power Commission Order November 23 1956**  
**Denying Rehearing**

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(B) The applications for rehearing of our Opinion No. 295 and accompanying order as filed on October 26, 1956, by Mississippi Valley Gas Company, the City of Memphis, and the Memphis Light, Gas and Water Division, jointly, and Willmut Gas and Oil Company are each hereby denied.

By the Commission.

LEON M. FUQUAY,  
Leon M. Fuquay,  
*Secretary.*

**Natural Gas Act of 1938, 52 Stat. 821****Rates and charges; schedules; suspension of new rates**

**SEC. 4 (a)** All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

**(b)** No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

**(c)** Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

**(d)** Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change

or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond,

to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

**Fixing rates and charges; determination of cost of production or transportation**

SEC. 5 (a) Whenever the Commission, after a hearing had upon its own action or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are

*Natural Gas Act of 1938, 52 Stat. 821*

unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

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**Administrative powers of Commission; rules, regulations, and orders**

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commissioner shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and conditions of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

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*Natural Gas Act of 1938, 52 Stat. 821***Rehearings; court review of orders**

**SEC. 19.** (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court

*Natural Gas Act of 1938, 52 Stat. 821*

unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(c) The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

## **Regulations of Federal Power Commission under Natural Gas Act, Part 154, Subdivisions 1-86**

### **APPLICATION**

#### **154.1 Application; obligation to file**

On and after December 1, 1948 every natural-gas company shall file with the Commission and post in conformity with the requirements of this part, schedules showing all rates, and charges for any transportation or sale of natural gas subject to the jurisdiction of the Commission and the classifications, practices, rules and regulations affecting such rates, charges and services, together with all contracts in any manner affecting or relating thereto; *Provided, however,* That all such presently effective schedules filed with the Commission before the aforesaid date shall be restated as set forth in § 154.82 to conform with the following rules and regulations, and filed and posted on or before the date specified in § 154.83.

### **DEFINITIONS**

#### **154.11 Rate schedule**

The term "rate schedule" means a statement of a rate or charge for a particular classification of transportation or sale of natural gas subject to the jurisdiction of the Commission, and all terms, conditions, classifications, practices, rules and regulations affecting such rate or charge. This term also includes any contract for which special permission has been obtained in accordance with § 154.52.

#### **154.12 Contract**

The term "contract" means any agreement which in any manner affects or relates to rates, charges, classifications, practices, rules, regulations or services for any transportation or sale of natural gas subject to the jurisdiction of the Commission. This term includes an executed service agreement.

*Regulations of Federal Power Commission under Natural Gas Act, Part 154, Subdivisions 1-86*

**154.13 Service agreement**

The term "service agreement" means an unexecuted form of agreement for service under a natural-gas company's tariff.

**154.14 Tariff or FPC gas tariff**

The term "tariff" or "FPC gas tariff" means a compilation, in book form, of all of the effective rate schedules of a particular natural-gas company, and a copy of each form of service agreement.

**154.15 Filing date**

The term "filing date" means the day on which a tariff or part thereof or a contract is received in the office of the Secretary of the Commission for filing in compliance with the requirements of this part.

**154.16 Posting**

The term "posting" means (a) making a copy of a natural-gas company's tariff and contracts available during regular business hours for public inspection in a convenient form and place at the natural-gas company's offices where business is conducted with affected customers and (b) mailing to each customer affected a copy of such tariff or part thereof at the time it is sent to the Commission for filing.

**IN GENERAL**

**154.21 Effective tariff**

The effective tariff of a natural-gas company shall be the tariff filed and posted pursuant to the requirements of this part, and permitted by the Commission to become effective. No natural-gas company shall directly or indirectly, demand, charge or collect any rate or charge for or in connection with

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**Regulations of Federal Power Commission under Natural Gas Act, Part 154, Subdivisions 1-86**

the transportation or sale of natural gas subject to the jurisdiction of the Commission, or impose any classifications, practices, rules or regulations, different from those prescribed in its effective tariff and executed service agreements on file with the Commission, unless otherwise specifically provided by order of the Commission.

**154.22 Notice requirements**

All tariffs, and contracts or any parts thereof shall be filed with the Commission and posted not less than thirty days nor more than sixty days prior to the proposed effective date thereof, unless a different period of time is permitted by the Commission in accordance with § 154.51: *Provided, however,* That no natural-gas company shall file under this part any new rate schedule or contract for the performance of any service for which a certificate of public convenience and necessity must be obtained pursuant to section 7 (c) of the Natural Gas Act, until such certificate has been issued. Nothing herein shall be construed as preventing the natural-gas company from entering into any such agreement prior to the granting of such a certificate.

**154.23 Acceptance for filing not approval**

The acceptance for filing of any tariff, contract or part thereof is not to be considered as approval by the Commission.

**154.24 Rejection of material submitted for filing**

The Commission reserves the right to reject any material submitted for filing which fails to comply with the requirements set forth in this part.

**154.25 Informal submission for staff suggestions**

Any natural-gas company may informally submit a tariff or any part thereof or material relating thereto for the suggestions of the staff of the Commission prior to filing.

*Regulations of Federal Power Commission under Natural Gas Act, Part 154, Subdivisions 1-86*

**154.26 Number of copies to be supplied**

Two copies of any tariff, contract, or part thereof, and material relating thereto, Certificates of Adoption, and Notices of Cancellation or Termination submitted for filing must be supplied to the Commission: *Provided, however,* That restatements filed pursuant to §§ 154.81 through 154.86 shall be furnished in quintuplicate. All copies are to be included in one package, together with a letter of transmittal and other material and information required by these rules, and addressed to the Federal Power Commission, Washington 25, D. C. The Commission reserves the right to request additional copies.

**154.27 Comments by interested parties**

Comments of any purchaser or other interested party concerning any filing made pursuant to this part should be submitted within 15 days after the date of filing. This section shall not limit any right to file protests and complaints.

**FORM AND COMPOSITION OF TARIFF**

**154.31 Application**

Sections 154.32 through 154.41 after December 1, 1948 are applicable to all rate schedules thereafter filed or restated, except that such sections are only partially applicable to rate schedules filed under § 154.52. (A form of an assembled tariff is available upon request.)

**154.32 Form, type, and size**

The tariffs shall be printed, typewritten or otherwise reproduced on 8½ by 11 inch sheets of a durable paper so as to result in a clear and permanent record. The sheets of the tariff shall be ruled to set off borders of 1¼ inches on top, bottom and left sides and ½ inch on the right side, punched on the left side and assembled in a binder.

**Regulations of Federal Power Commission under Natural Gas Act, Part 154, Subdivisions 1-86**

**154.33 Binder, title page and arrangements**

(a) The binder shall show on the front cover:

FPC Gas Tariff  
Original Volume No. 1  
of  
(Name of Natural-Gas Company)  
Filed with  
Federal Power Commission

If it is advisable to submit the tariff in two or more volumes, the volumes shall be identified by "Original Volume No. 1", "Original Volume No. 2", etc., directly below the words "FPC Gas Tariff." Rate schedules for which special exception has been obtained under § 154.52 may be filed in a separate volume as part of the tariff.

(b) When any volume of a tariff is to be superseded or replaced in its entirety, the replacing volume shall show prominently on the binder and the title page the volume number being superseded or replaced, as for example:

FPC Gas Tariff  
First Revised Volume No. 1  
(Supersedes Original Volume No. 1)

(c) The first page shall be a title page which shall carry the information shown on the cover and, in addition, the name, title, and address of the person to whom communications concerning the tariff should be sent.

(d) All sheets except the title page shall have the following information placed in the margins:

(1) *Identification.* At the left above the top marginal ruling, the exact name of the company shall be shown, under which shall be set forth the words "FPC Gas Tariff," together with volume identification where applicable.

~~Secret~~

**Regulations of Federal Power Commission under Natural Gas Act, Part 154, Subdivisions 1-86**

(2) *Numbering of sheets.* At the right above the top marginal ruling, the sheet number shall appear after the words "Original Sheet No. ...." All sheets in the originally filed tariff shall be numbered consecutively beginning with the table of contents as "Original Sheet No. 1."

(i) Revised or superseding sheets shall be numbered "..... Revised Sheet No. ...." below which shall appear "Superseding ..... Sheet No. ...." The first blank above shall show the number of the revision (i.e., First, Second, etc.) and the sheet number shall be the same as the sheet replaced. The third and fourth blanks shall be filled according to the numbering of the sheet replaced.

(ii) Sheets which are to be inserted between two consecutively numbered sheets shall be designated "Original Sheet No. ....," with the blank space filled with the appropriate number and a letter to indicate an insertion. Illustration: Three sheets would come between original sheets 8 and 9 would be designated "Original Sheet No. 8A," "Original Sheet No. 8B," and "Original Sheet No. 8C."

(3) *Issuing officer and issue date.* On the left below the lower marginal ruling, shall be placed "Issued by:" followed by the name and title of the person authorized to issue the sheet. Immediately below shall be placed "Issued on" followed by the date of issue.

(4) *Effective date.* On the right below the lower marginal ruling shall be placed "Effective:" followed by the specific effective date desired by the Company.

(5) *Sheets filed to comply with Commission orders.* Sheets which are filed to make effective rate schedules or provisions ordered by the Commission shall carry the following notation in the bottom margin: "Issued to comply with order of the Federal Power Commission, Docket No. ...., dated ....."

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**154.34 Composition of tariff**

(a) The tariff shall contain, in the order named, sections setting forth a table of contents, a preliminary statement, a map of the system, the rate schedules, general terms and conditions, form of service agreement and an index of purchases: *Provided, however,* That rate schedules for which special exception has been obtained under § 154.52 may be filed in a separate volume as permitted by § 154.33.

(b) Rate schedules shall be grouped according to class and numbered serially within each group, using a letter before the serial number to indicate the class of service. For example, G-1, G-2 may be used for general service; CD-1, CD-2 for contract demand service; I-1, I-2 for interruptible service; T-1, T-2 for transmission service; X-1, X-2 for schedules for which special exception has been obtained.

**154.35 Table of contents**

The table of contents shall contain a list of the rate schedules and other sections in the order in which they appear, showing the sheet number of the first page of each section. The list of rate schedules shall consist of (a) the symbol designation of each rate schedule, (b) a very brief description of the service, and (c) the sheet number of the first page of each rate schedule.

**154.36 Preliminary statement**

The preliminary statement shall contain a brief general description of the company's operations and may also contain a general explanation of its policies and practices. No general rules and regulations shall be included in the preliminary statement, nor any material necessary for the interpretation or application of the rate schedules.

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**154.37 Map**

The map shall show on a single sheet, if practicable, the general geographic location of the company's principal pipe line facilities and of the points at which service is rendered under the tariff. Where the company's rate schedules are generally available by area, the boundary lines of the rate zones or rate areas should be shown and the areas or zones identified. The map shall be revised annually to reflect major changes if any.

**154.38 Composition of rate schedule**

The sheets of a rate schedule shall contain a statement of a rate or charge and all terms and conditions governing its application, arranged as follows:

(a) *Title.* Each rate schedule shall have a title consisting of a designation (see § 154.34), and a statement of the type or classification of service to which it is applicable.

(b) *Availability.* This paragraph shall describe the conditions under which the rate is available, and, if necessary, the geographic zone in which available.

(c) *Applicability and character of service.* This paragraph shall fully describe the kind or classification of service to be rendered.

(d) *Statement of rate.* (1) Except as permitted in §§ 154.52 and 154.82, all rates shall be clearly stated in cents or in dollars and cents per unit. Only the rates and charges to be used in current billing shall be included in the rate schedules.

(2) A rate having more than one part shall have each part set out separately under appropriate headings such as: Demand Charge, Commodity Charge, etc. The mini-

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minimum bill and other provisions affecting charges shall not be included in this paragraph, but shall be included in subsequent paragraphs.

(3) No rule, regulation, exception or condition, such as tax, commodity price index, wholesale price index, purchased gas cost adjustment clauses or other similar price adjustments or periodic changes shall be included in the rate schedule or any other part of the tariff which in any way purports to effect the modification or change of any rate or charge specified in the rate schedule, or the substitution therefor of any other rate or charge: *Provided, however*, a natural-gas company may state in the service agreement or in rate schedules filed pursuant to § 154.52 that it is or will be its privileges under certain specified conditions, to propose to the Commission a modification, change or substitution of the then effective rate or charge: *Provided further*, That no such clause may effectuate a change in an effective rate or charge except in the manner provided in section 4 of the Natural Gas Act, as amended, and the regulations in this part.

(e) *Minimum bill.* The minimum bill heading shall appear on every rate schedule followed by the word "none" if no minimum bill is provided.

(f) *Other provisions.* All other major provisions governing the application of the rate schedule, such as determination of billing demand, contract demand, heat content, measurement base, shall be set forth similarly with appropriate headings, or if appropriate, they may be incorporated by reference to the applicable general terms and conditions.

(g) *Applicable general terms and conditions.* This paragraph shall list by reference the general terms and conditions set forth in the following section which apply to the particular rate schedule.

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**154.39 General terms and conditions**

This section shall contain provisions which apply to all or any of the rate schedules and which may more conveniently be arranged in a separate section of the tariff. Subsections and paragraphs shall be numbered for convenient reference.

**154.40 Composition of service agreement**

There shall be submitted as part of the tariff an unexecuted copy of each form or service agreement. The service agreement forms should provide for insertion of such items as the name of the purchaser, service to be rendered, area to be served, maximum obligation to deliver, delivery points, delivery pressure, applicable rate schedules by reference to the tariff, effective date and term, and identification of any prior agreements being superseded.

**154.41 Index of purchasers**

(a) The index of purchasers shall contain an alphabetical list of all purchasers under the tariff, showing for each the rate schedule or schedules under which service is rendered, and the following information concerning the contract: (1) the date of execution, (2) the effective date and (3) the term.

(b) The index of purchasers shall be kept current by filing new or revised sheets within 60 days of any change.

**SPECIAL PERMISSIONS**

**154.51 Waiver of notice requirements**

Upon application and for good cause shown, the Commission may by order provide that a tariff, contract, or part thereof shall be effective on less than 30 days notice. The Commission, upon request and for good cause shown, may

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permit a tariff, contract, or part thereof to be filed prior to sixty days before the proposed effective date.

**154.52 Exception to form and composition of tariff**

(a) Upon application and for good cause shown, the Commission may permit special rate schedules to be filed in the form of an agreement in the case of special operating arrangements such as for exchange or transportation of natural gas; or for the sale of gas at charges computed on a cost-formula basis, which charges need not be stated in cents or in dollars and cents per unit. Such rate schedules shall conform to the form, type and size specified in § 154.32 and shall contain on each sheet the marginal notation specified in § 154.33. In addition each such rate schedule shall contain a title page which shall show its designation, the parties to the agreement, the date of agreement and a brief generalized description of services to be rendered. Such rate schedules shall not contain any supplements. Any modifications shall be by revised or insert sheets.

(b) Such rate schedules may be included in a separate volume of the tariff, which shall contain a table of its contents. This table of contents shall also be incorporated with the table of contents of other volumes.

**METHOD OF SUBMISSION FOR FILING**

**154.61 Application**

Sections 154.62 through 154.65, except as otherwise specifically provided in this part, apply to all tariffs, executed service agreements, or parts thereof which are filed after December 1, 1948.

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**154.62 Material submitted with initial rate schedule or executed service agreement**

(a) With the filing of any initial rate schedule or executed service agreement not superseding or making any change in a rate schedule, executed service agreement, or part thereof already on file, there shall be included a letter of transmittal containing a list of the material inclosed, the date on which such filing is proposed to become effective, and a list of the purchasers to whom it has been mailed: *Provided, however, That the provisions of this section shall not be applicable to filings made pursuant to §§ 154.81 through 154.86.*

(b) In addition, the following material shall be submitted when applicable:

(1) *Statement of the reasons for initial rate schedule.* A statement of the nature, and the reason for such proposed initial rate schedule. Data submitted in response to subsequent items may be included by reference as a part of the response to this item.

(2) *Estimate of sales and revenues under an initial rate schedule or executed service agreement.* An estimate of sales or transportation performed and revenues thereunder, by months, for the 12 months immediately succeeding the proposed effective date. The estimate shall be subdivided by rate schedules, classes of service, customers and delivery points, when more than one is involved. Such data shall include estimates of actual and billing quantities, that are to be used to compute the charges, such as actual demands, billing demands, volumes, heat content, and other determinants.

(3) *Basis of the rate or charge proposed in initial rate schedule.* A statement shall be submitted explaining

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the basis used in arriving at the proposed rate or charge. Such statement shall clearly show whether such rate or charge results from negotiation, cost of service determination, competitive factors, or others, and shall give the nature of any studies which have been made in connection therewith. If all or any portion of such information has already been submitted to the Commission, specific reference thereto should be made.

**154.63 Material submitted with changes in a tariff, executed service agreement or part thereof**

(a) With the filing of any tariff, executed service agreement or part thereof which changes or supersedes any tariff, contract or part thereof on file with the Commission, there shall be included a letter of transmittal containing a list of the material enclosed, the date on which such filing is proposed to become effective, and a list of the purchasers to whom it has been mailed: *Provided, however,* That the provisions of this section shall not be applicable to filings made pursuant to §§ 154.81 through 154.86, unless such filing results in a change in rate, charge, classification or service.

(b) In addition, the following material is to be submitted where applicable:

(1) *Statement of reasons for change in tariff, contract, or part thereof.* A statement of the nature, the reasons and the basis for the proposed change. Data submitted in response to subsequent items may be included by reference as part of the response to this item.

(2) *Comparison of sales and revenues if change in rate or charge involved.* A comparative statement of sales made or transportation performed and revenues therefrom, by months, under the present and proposed tariff,

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contract, or part thereof, each applied to the transactions for the twelve months immediately preceding and for the twelve months immediately succeeding the proposed effective date of the change in tariff, contract or part thereof. Actual data shall be used as far as possible, and any estimated data should be designated as such. The statement shall be subdivided by rate schedules, classes of service, customers, and delivery points when more than one is involved. Such data shall include actual and billing quantities that are used to compute the charges, such as actual demands, billing demands, volumes, heat content and other determinants.

(3) *Rate increase filings*—(i) *Rate increases.* (a) If the proposed change in tariff or rate schedule will result in a major increase in rates or charges, there shall be submitted Statements A to M, inclusive, described hereafter: *Provided, however,* That Class B, C and D companies, as defined in the Uniform System of Accounts for natural gas companies, need file only Statements L, M and N. Proposed increases are major when (1) the changes relate to a general increase in revenues for the purpose of obtaining a fair return on the jurisdictional sales, (2) where they extend to all, or substantially all, of the jurisdictional sales, or (3) where an increase in rates is associated with the delivery of substantially increased volumes of gas to existing customers: *Provided, however,* That a natural gas company filing another major increase in rates or charges within a period of twelve months after the filing of Statements A through M, or the end of the test period used therein including the period of adjustments shown on Statements A through M, may submit for such other increase Statements L, M, and N in lieu of Statements A through M if:

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(i) The proposed new rate increase is filed to compensate only for an increase in the cost of purchased gas; and

(ii) There has been no material change in the natural gas company's facilities, sales volumes, and cost of service other than cost of purchased gas since such prior rate increase was filed.

[Subparagraph (a) amended by Order 185, 21 F. R. 1485, Mar. 8, 1956]

(b) If minor increases are proposed, then Statements L, M and N shall be filed. Minor changes are those which are not designed to provide general revenue increases, such as to offset increased costs or otherwise achieve a fair return on the over-all jurisdictional business. Minor changes usually relate to a few schedules and are designed to bring such schedules into harmony with general tariff policy, to eliminate inequities and to achieve other formal adjustments, in cases where any increase in revenue is subordinate to some other purpose. For the purpose of compliance with these rules, proposed increases in rates or charges which, for the test period, do not exceed the smaller of \$100,000, or 5 percent, of the revenues under the jurisdiction of the Commission shall be considered minor.

(c) If the natural gas company has relied on data other than those in Statements A through N in support of its rate increase, such other data, appropriately identified and designated as such and separately stated, shall be submitted with the data required by Statements A to N but limited to the test period referred to below. Ten sets of the statements and of the additional information, if any, shall be submitted, each set securely bound in a cover.

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[Subparagraph (c) amended by Order 185, 21 F. R. 1485, Mar. 8, 1956]

(d) Where the data submitted in Statements A to N do not comply with the requirements of the rules, the rate filing is subject to rejection: *Provided, however, That, if the proposed rate increase is filed at least 45 days before the effective date proposed therefor and such filing does not comply with the requirements of the rules, the natural gas company will be notified of the deficiencies, and if such deficiencies are properly cured within 10 days from the date of such notice, the requisite supplementary material will be deemed to have been filed as of the same date as the initial submittal of the proposed rate increase.*

[Subparagraph (d) amended by Order 185, 21 F. R. 1485, Mar. 8, 1956]

(e) Test period: (1) If the natural gas company has been in operation for 12 months at the time of the filing, the Statements A to K, inclusive, or N, as appropriate, shall be based upon a test period consisting of 12 consecutive months of most recently available actual experience, adjusted for changes in revenues and costs which are known and are measurable with reasonable accuracy at the time of the filing, and which will become effective within eight months of the last month of available actual experience: *Provided, however, That, for good cause shown, upon application of the natural gas company made to the Commission 30 days in advance of the rate filing, the Commission may allow reasonable deviation from the prescribed test period. The 12 months of experience shall be adjusted to eliminate nonrecurring items, but this shall not preclude the replacement of the non-recurring item with another item of nonrecurring nature which the natural gas company anticipates will be realized, including the provision for the normalizing of such items as rate case expenses. If the natural gas company has had less*

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than 12 months' experience, the test period may consist of 12 consecutive months ending not more than one year from filing date.

[Subparagraph (1) amended by Order 185, 21 F. R. 1485, Mar. 8, 1956]

(2) Adjustments to experience, or estimates where 12 months' experience is not available, may include the amounts for facilities for which a permanent or temporary certificate is outstanding, provided such facilities will be in service within the test period, but shall not include any amounts for facilities in respect to which a certificate of public convenience and necessity must be obtained but which has not been issued at the date of filing, nor shall adjustments or estimates include any amounts for other facilities associated therewith. The bases and procedures, including significant data, used in the derivation of adjustments or estimates shall be submitted in sufficient detail on supporting statements as to permit ready analysis of such adjustments or estimates.

(f) Joint facilities: If the natural gas company operates other departments in addition to the natural gas operations involved in the subject-rate increase and has allocated to such natural-gas operations any of its investment in joint or other department facilities and the operating, maintenance, or depreciation costs associated therewith, it shall show on the following statements, or the schedules in support thereof, the amounts so allocated together with the methods used in making such allocations: *Provided*, That if such allocations are recorded in the natural gas company's books on the basis of current accounting procedures the submittal may be confined to a brief description of the methods followed

**Statement A—Over-all cost of service.** This statement shall summarize the over-all gas utility cost of service

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(operating expenses, depreciation, taxes and return) developed from the supporting statements described below.

**Statement B—Rate base and return.** This statement shall summarize the over-all gas utility rate base from the figures contained in Statements C, D, and E, with an appropriate deduction for Contributions in Aid of Construction, if any. The statement shall also include the claimed rate of return and shall show the application of the claimed rate of return to the over-all rate base.

**Statement C—Cost of plant.** This statement shall show in summary form the amounts of gas utility plant classified by Accounts 100.1, 100.2, 100.3, 100.4, 100.5 and 100.6 as of the beginning of the 12 months of actual experience, the book additions and reductions during such 12 months together with the balances at the end of such 12 months. In adjoining columns there shall be shown the adjustments, if any, to the book balances and the total cost of the plant.

A supporting schedule in similar columnar form shall be submitted showing for each of the above accounts the amounts by detailed plant accounts as prescribed by the Commission's Uniform System of Accounts for Natural Gas Companies (§§ 201.301 to 201.392 of Subchapter F of this chapter) with subtotals thereof by functional classifications, i. e., Intangible Plant, Manufactured Gas Production Plant, Natural Gas Production Plant, Products Extracting Plant, Underground Storage Plant, Local Storage Plant, Transmission Plant City Gate and Main Line Industrial Measuring and Regulating Station Plant, General Distribution System Plant, and General Plant: *Provided, however, That to the extent plant costs are not available by detailed plant accounts they may be shown by functional classifications. All adjustments shall be fully and clearly explained.*

The supporting schedule for Account 100.1 shall include appropriate adjustments to exclude major items of plant which are expected to be retired from service during the period.

The supporting schedule for Account 100.3 shall include adjustments to exclude such plant as in process of construction which is not expected to be placed in service by the end of the test period.

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The major plant additions and retirements, together with associated costs, for the test period shall be described and the approximate dates of commercial operation or retirement from service shall be given.

*Statement D—Accrued depreciation, depletion and amortization.* This statement shall show the depreciation, depletion and amortization reserves by functional classifications of gas utility plant as of the beginning of the 12 months of actual experience, the book additions and reductions during such 12 months, together with the balances at the end of such 12 months. In adjoining columns there shall be shown the adjustments, if any, to the book figures and the total. Such adjustments shall be clearly and fully explained. If it is necessary to allocate an over-all gas plant reserve by functions, a complete explanation of the method, procedures and significant data used in making the allocation shall be set forth.

*Statement E—Working capital.* This statement shall show the computation of the working capital claimed as a part of the gas utility rate base. The statement shall show the respective components of the claimed working capital and be in such detail as to show how the amount of each component was computed. The balances for Materials and Supplies and Prepayments for gas utility operations shall be shown at the beginning and at the end of each of the 12 months of actual experience.

If the cost of natural gas in storage is claimed as a part of the rate base, a separate supporting schedule shall be submitted showing the quantities and the respective costs of natural gas stored at the beginning of the test period, the input and output in Mcf and associated costs by months, and the balance at the end of the 12 months of actual experience.

Any necessary adjustments shall be shown in columns adjoining the amounts reported in the books. Such adjustments shall be clearly and fully explained.

*Statement F—Rate of return—(1) Rate of return claimed.* This statement shall show the percentage rate of

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return claimed and the general reasons therefor. In addition, the following information shall be submitted:<sup>1</sup>

(2) *Debt capital.* (i) Show for each class and series of long-term debt outstanding according to the balance sheet as of the end of the 12-months actual experience:

(a) Title.

(b) Date of issuance and date of maturity.

(c) Interest rate.

(d) Principal amount of issue:

Gross proceeds.

Underwriters discount or commission:

Amount.

Percent gross proceeds.

Issuance expense:

Amount.

Percent gross proceeds.

Net proceeds.

Net proceeds per unit.

(e) Cost of money:

Yield of maturity based on the interest rate and net proceeds per unit outstanding determined by reference to any generally accepted table of bond yields.

(f) If issue is owned by an affiliate, state name and relationship of owner.

(ii) Show weighted average cost of debt capital as determined from the foregoing detail.

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<sup>1</sup>Where a substantial portion of the common stock of the natural gas company is not held by the public but is owned by another corporation, whose principal business is the holding of the securities of gas utilities, the information required by this section in respect of debt capital and preferred stock capital shall be submitted to the extent applicable, and in addition the data described shall be submitted with respect to the debt, preferred stock and common stock of the parent company.

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**(3) Preferred stock capital. (i) Show for each class and series of preferred stock outstanding according to the balance sheet as of the end of the 12-months actual experience:**

- (a) Title.**
- (b) Date of issuance.**
- (c) If callable, call price.**
- (d) If convertible, terms of conversion.**
- (e) Dividend rate.**
- (f) Par or stated amount of issue:**

**Gross proceeds.**

**Underwriters' discount or commission:**

**Amount.**

**Percent gross proceeds.**

**Issuance expenses:**

**Amount.**

**Percent gross proceeds.**

**Net proceeds.**

**Net proceeds per unit.**

- (g) Cost of money:**

**Dividend rate divided by net proceeds per unit.**

- (h) Whether issue was offered to stockholders through subscription rights or to the public.**

- (i) If issue is owned by an affiliate, state name and relationship of owner.**

**(ii) Show weighted average cost of outstanding preferred stock capital as determined by detail submitted under Subpart (2) (i) above.**

**(4) Common stock capital. (i) Show for each sale of common stock during the five-year period preceding the balance sheet as of the end of the 12-months actual experience:**

- (a) Number of shares sold.**

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(b) (1) Gross proceeds at offering price.

(2) Underwriters' discount or commission:

Amount.

Percent gross proceeds.

(3) Proceeds to applicant.

(4) Issuance expenses:

Amount.

Percent gross proceeds.

(5) Net proceeds:

Offering price per share.

Net proceeds per share.

(c) Book value per share at date immediately prior to issuance:

Closing market price at latest trading date prior to date of issuance.

Latest published earnings per share available at date of issuance.

Dividend rate at date of issuance.

(d) Whether issue was offered to stockholders through subscription rights or to the public.

(ii) Submit information respecting any stock dividends, stock splits or changes in par or stated value during five-year period preceding date of the balance sheet and by months for the twelve-month period ended that date.

(iii) Submit following information on outstanding common stock for the five calendar years preceding the date of the balance sheet and by months for the twelve-month period ended that date:

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Average number of shares out- stand- ing <sup>1</sup>	Book value (per share) <sup>1</sup>	Annual earn- ings (per share) <sup>2</sup>	Annual divi- dend (rate per share)	Divi- dends (per cent earn- ings)	Average market price, basis monthly, high-low ratio) <sup>3</sup>	Earn- ings (price ratio) <sup>3</sup>	Divi- dends (price ratio) <sup>4</sup>
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Years:

- 1.....
- 2.....
- 3.....
- 4.....

Months:

- 1.....
- 2.....
- 3.....
- 4.....
- 5.....
- 6.....
- 7.....
- 8.....
- 9.....
- 10.....
- 11.....
- 12.....

<sup>1</sup>This information need not be submitted by months.

<sup>2</sup>For monthly figures, show latest reported twelve-month average.

<sup>3</sup>Relationship of annual earnings per share to average of the 12 monthly high-low market values of stock. In the case of monthly data use latest reported earnings in computing ratio of earnings to average high-low market value for month.

<sup>4</sup>Relationship of dividend per share to average high-low market value of stock.

(iv) If the applicant relied upon ratios or other data concerning the common stocks of other specific companies in reaching its conclusion as to a fair allowance for earnings on

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common equity, submit the following information to the extent available from published sources respecting the common stock of such other companies:

- (a) With respect to recent issuances, the same information as submitted under (3) (i).
- (b) With respect to outstanding issues, the same information as submitted under (3) (iii).
- (v) Show the earnings per share of common stock which the claimed rate of return would yield.

***Statement G—Gas operating revenues and sales volumes.***

—This statement shall show the revenues from gas sales, other gas-operating revenues, and sales volumes classified as between jurisdictional and non-jurisdictional sales and services as follows:

- (a) Revenues by months and the totals thereof for the 12 months of actual experience from jurisdictional sales as computed under the presently effective and proposed rates together with the differences in the annual revenues, and the actual annual revenues from the non-jurisdictional sales.
- (b) Revenues by months and the totals thereof for 12 months of actual experience as adjusted for changes which are known and measurable and which are expected to be realized within 8 months of the last month of available actual experience from jurisdictional sales as computed under the presently effective and proposed rates together with the differences in the annual revenues for the test period, and the annual revenues from the non-jurisdictional sales under the rates effective during the test period.

Each jurisdictional sale for resale, and each jurisdictional transportation service, shall be shown separately but the main line non-jurisdictional sales and non-jurisdictional field sales may be separately grouped and the other sales may also be grouped by the classifications prescribed by the Commission's Uniform System of Accounts for Natural Gas Companies. For each revenue item shown separately, there shall

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be shown the points of delivery, the billing quantities for each month and their determinants or adjustments (demands, volumes, Btu content, Btu adjustment, etc.), and the maximum single day's delivery in each month if available. In the event any sale shown separately is made through more than one delivery point, and conjunctive billing is provided by the tariff, the above data may be combined for all delivery points.

This Statement G shall be included, in full, in the submittal to the Commission and to all State commissions having jurisdiction over the affected customers of the natural-gas company. The submittal to each of the affected customers may be limited to exclude the above details by months except with respect to the gas sales to, or transportation service for, that particular customer, provided a copy of Statement G, in full, is promptly submitted to any affected customer upon such customer's request.

The data supplied in this statement shall be in lieu of the data called for by section 154.63 (b) (2) of these rules.

[Statement G amended by Order 185, 21 F. R. 1485, Mar. 8, 1956]

*Statement H—Revenue deductions—*(1) *Operating expenses.* This statement shall show the gas operating expenses according to each account of the Uniform System of Accounts for Natural Gas Companies. The operating expenses shall be shown under appropriate columnar headings, as follows, with sub-totals for each functional classification: (a) Actual operating expenses by months for the 12 months of actual experience, and the total thereof, (b) adjustments, if any, to such total actual operating expenses, and (c) total adjusted operating expenses for the test period. Detailed explanations of the adjustments, if any, and the manner of their determination shall be supplied, specifying the month or months during which the adjustments would be applicable.

On a separate supporting schedule, the total annual cost of gas purchased for the most recent 12 months of actual experience, the adjustments thereto for the test period, and the total adjusted cost shall be detailed for each purchase source of supply, provided, however, that with respect to field and gasoline outlet purchases, as designated in the Uniform System of Accounts for Natural Gas Companies,

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the data, except that relating to purchases from affiliates, may be grouped by fields and prices. The schedule shall also show the volumes in Mcf. pressure base, and the components of the purchase gas costs as between demand costs, commodity costs, etc. Field purchases of 100,000 Mcf or less annually from individual vendors may be grouped by field or production areas.

(2) *Depreciation, depletion, and amortization expense.* This statement shall show the gas plant depreciation, depletion, and amortization expense by functional classifications for the test period. These expenses shall be shown in separate columns, as follows: (a) Expenses for the 12 months of actual experience, (b) adjustments, if any, to such expense, and (c) the total adjusted expense for the test period. All adjustments shall be fully and clearly explained. The amounts of depreciable plant shall be shown by the functions specified in Account 503.1, Depreciation of the Commission's Uniform System of Accounts for Natural Gas Companies, and, if available, for each detailed plant account, together with the rates used in computing such expenses. Any deviation from the rates used in the applicant's last annual report on file with the Commission shall be explained showing the rate or rates previously used together with supporting data for the new rate or rates used for this statement.

(3) *Income taxes.* This statement shall show the estimated income taxes and the computation thereof separately as between Federal and State, for the test period, based on the claimed return applied to the overall gas utility base. If the natural gas company has income from other departments, there shall be shown the total estimated corporate income tax for the test period and the methods employed in allocating such total tax to the several departments. If the natural gas company joins in a consolidated tax return, there shall be given the total estimated tax savings expressed as a percentage, resulting from the filing of the consolidated return, as well as a full explanation of the method of computing the tax saving for the natural gas company and its natural gas utility department.

Any abnormalities (such as non-recurring income, losses, deductions, etc.) affecting the income tax for the test period shall be explained and the tax effect thereon set forth.

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(4) *Other taxes.* This statement shall show the gas utility taxes, other than Federal or State income taxes, applicable to the test period. These taxes shall be shown in separate columns, as follows: (a) Tax expense per books for the 12 months of actual experience, (b) adjustments, if any, to such taxes, and (c) the total adjusted taxes for the test period. The taxes shall be shown by states and by kind of taxes. All adjustments shall be fully and clearly explained.

*Statement 1—Allocation of over-all cost of service.* This statement shall show the allocation of the over-all cost of service (Statement A), between the jurisdictional and the non-jurisdictional sales and services. The statement shall show the allocation of the operating expenses (by functional classifications), depreciation, depletion and amortization expenses, income taxes, other taxes and return, and for each such cost of service item the statement shall show the allocation ratio or ratios used, including the derivation of such ratios. The methods and the procedures used in allocating the costs shall be set forth in such detail as to readily disclose the principles and steps followed. Where a demand factor is used in allocating costs, full details of the classification of costs to that factor and of the bases of allocation, such as respective loads during peak period, etc., shall be given. The deliveries to jurisdictional and non-jurisdictional customers on the three continuous days of Maximum transmission system deliveries during October, November, December, January, February, and March within the 12 months of actual experience shall be shown and classified as between firm, interruptible, exchange, emergency, etc., gas deliveries. In addition, there shall be shown the estimated three-day corresponding data for the test period, if expected to be different from actual experience.

This statement shall include a schedule showing by months, and total thereof, for the same twelve months of actual experience, the company's Gas Account, in the form required by the Commission's Annual Report Form No. 2, page 121. In addition, there shall be shown corresponding data estimated for the test period, if expected to be different from the actual experience.

**Regulations of Federal Power Commission under Natural Gas Act, Part 154, Subdivisions 1-86**

**Statement J—Allocation of cost of service by zones.** If the rates on file are zoned, or if it is proposed to establish zone rates, the cost of service for the test period shall be further allocated to the existing or proposed rate zones. A detailed description of methods and procedures used to allocate cost to zones shall be given. Where zones are sought to be established for the first time, the reasons for this establishment and for the zone boundaries selected shall be set forth.

**Statement K—Comparison of estimated revenues with cost of service.** This statement shall consist of a comparison of the total jurisdictional revenues with the allocated cost of service for the test period. Where zone rates are in existence or are proposed, this statement shall also include a comparison of revenues and costs by zones.

**Statement L—Balance Sheet.** A balance sheet in the form prescribed by the Commission's Uniform System of Accounts for Natural Gas Companies as of the beginning of the 12 months of most recently available actual experience and as of the most recent date available, including therein the notes, if any, applicable to the balance sheet.

**Statement M—Income statement.** An income statement in the form prescribed by the Commission's Uniform System of Accounts for Natural Gas Companies for the 12 months of most recently available actual experience, including therein the notes, if any, applicable to the income statement.

**Statement N—**This statement shall contain the principal determinants essential to test the reasonableness of the proposed rate or charge. Any adjustments to book figures, for the items shown below, shall be separately stated and the basis for the adjustment shall be explained. The following data for the test period shall be submitted:

1. Cost of plant by functional classification as of the beginning and as of the end of the test period.
2. Accrued reserve for depreciation, depletion and amortization by functional classifications as of the beginning and as of the end of the test period.

***Regulations of Federal Power Commission under Natural Gas Act, Part 154, Subdivisions 1-86***

3. Average working capital by components of the claimed working capital using the averages of the amounts as of the beginning and as of the end of each month of the test period.

4. Rate of return claimed with a brief statement of the basis therefor.

5. Operating expenses by functional classifications.

6. Depreciation, depletion, and amortization expense by functional classifications.

7. Income taxes computed on the basis of the rate of return claimed.

8. Other taxes.

9. Cost of service allocated to the sales or services for which the increase in rate, or charge is proposed, including the principal determinants used for allocation purposes.

10. Comparison of cost of service with revenues under proposed rates.

When this statement is filed pursuant to the second proviso of section 154.63 (b) (3) (i) (a) and the beginning of the 12 consecutive months of the most recently available actual experience is more than one month beyond the 12 months of actual data used in the prior rate-increase filing, the natural-gas company shall also show separately in this statement the actual data for the intervening period for items 1, 2, 5, 6, and 8 above and total sales volumes and revenues for such period broken down between jurisdictional and non-jurisdictional sales.

[Above paragraph added by Order 185, 21 F. R. 1485, Mar. 8, 1956]

(ii) *Preparation for hearing.* A natural-gas company filing for an increase in rates or charges shall be prepared to go forward at a hearing on reasonable notice and sustain the burden of proof imposed by the Natural Gas Act of establishing that its proposed changes are just and reasonable and not unduly discriminatory or preferential.

***Regulations of Federal Power Commission under Natural Gas Act, Part 154, Subdivisions 1-86***

(4) *Submission of material by reference.* If all or any portion of the information called for by paragraph (a) through (d) of this section has already been submitted to the Commission, specific reference thereto may be made in lieu of resubmission in response to these requirements.

(5) *Change in executed service agreement.* Agreements intended to effect a change or revision of an executed service agreement shall be in the form of a superseding executed service agreement only. Service agreements shall not contain any supplements.

**154.64 Cancellation or termination**

When a filed tariff, contract or part thereof is proposed to be canceled or is to terminate by its own terms and no new tariff, executed service agreement or part thereof is to be filed in its place, the natural-gas company shall notify the Commission of the proposed cancellation or termination on the form indicated in § 250.2 or § 250.3, whichever is applicable, at least thirty days prior to the proposed effective date of such cancellation or termination. A copy of such notice to the Commission shall be duly posted. With each notice, the company shall submit a statement showing the reasons for the cancellation or termination, a list of the affected purchasers to whom the notice has been mailed, the sales made or transportation performed and revenues therefrom, by months, for the twelve months immediately preceding the proposed effective date of the cancellation or termination. Actual data shall be used as far as possible, and any estimated data should be designated as such. Such statement shall be subdivided by rate schedules, classes of service, customers and delivery points when more than one is involved: *Provided, however,* That the filing of such notice shall not be construed as compliance with the requirements of section 7 (b) of the Natural Gas Act.

*Regulations of Federal Power Commission under Natural Gas Act, Part 154, Subdivisions 1-86*

**154.65 Adoption of tariff by successor**

Whenever the tariff or contracts of a natural-gas company are to be adopted by another company or person as a result of an acquisition, or merger, authorized by appropriate certificate of public convenience and necessity, or for any other reason, the succeeding company shall file with the Commission and post within thirty days after such succession a certificate of adoption on the form prescribed in §250.4. Within ninety days after such notice is filed, the succeeding company shall file a tariff with the sheets bearing the correct name of the successor company, to replace the tariff previously adopted.

**154.66 Changes relating to suspended tariffs, executed service agreements or parts thereof**

(a) *Withdrawal of suspended tariffs, executed service agreements or parts thereof.* Where a tariff, executed service agreement or part thereof has been suspended by the Commission, it may be withdrawn during the period of suspension only by special permission of the Commission upon application therefor and for good cause shown.

(b) *Changes in suspended tariffs, executed service agreements or parts thereof.* A natural-gas company may not, within the period of suspension, file any change in a tariff, executed service agreement or part thereof which has been suspended by order of the Commission except by special permission of the Commission granted upon application therefor and for good cause shown.

(c) *Changes in tariffs, executed service agreement or parts thereof continued in effect, and which were to be changed by the suspended filing.* A natural-gas company may not, within the period of suspension, file any change in a tariff, executed service agreement or part thereof continued in effect by operation of the order of suspension, and which

***Regulations of Federal Power Commission under Natural Gas Act, Part 154, Subdivisions 1-86***

was proposed to be changed by the suspending filing, except by special permission of the Commission granted upon application therefor and for good cause shown.

[§ 154.66 added by Order 159, 16 F. R. 2389, Mar. 14, 1951]

**RESTATEMENT OF SCHEDULES FILED PRIOR TO DECEMBER 1, 1948**

**154.81 Application.**

Sections 154.82 through 154.86 apply to effective schedules of rates, charges, classifications, practices, regulations and contracts for the transportation or sale of natural gas subject to the jurisdiction of the Commission filed prior to December 1, 1948, which have not been prepared in accordance with §§ 154.31 through 154.41, and for which special exception has not been obtained under § 154.52.

**154.82 Requirement for restatement**

All effective schedules of rates, charges, classifications, practices, regulations, and contracts not prepared in accordance with §§ 154.31 through 154.41 shall be restated and filed as parts of a Tariff in accordance with said sections on or before the dates specified in § 154.83 and duly posted at the time of filing: *Provided, however,* That price provisions which cannot be restated in cents or in dollars and cents per unit, as required by § 154.38 (d), without effecting a change in rates or charges may be retained in effect without change. *Provided, further,* That when necessary, pending completion of restatement within the time provided for by § 154.83 schedules may be filed in accordance with this part as in effect prior to December 1, 1948.

**154.83 Filing date of restatements**

(a) Natural gas companies shall file, in quintuplicate restatements of their rate schedules as parts of tariffs on or

***Regulations of Federal Power Commission under Natural Gas Act, Part 154, Subdivisions 1-86***

before the dates specified below, unless an extension of time is granted by the Commission upon application and for good cause shown:

***Companies Making Their Major Sales in and Date***

Colorado, Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, Ohio, South Dakota, Utah, West Virginia, Wisconsin, Wyoming: On or before March 1, 1949.

Alabama, District of Columbia, Florida, Georgia, Kentucky, Maryland, New York, New Jersey, North Carolina, Pennsylvania, Tennessee, Virginia: On or before April 1, 1949.

Arizona, Arkansas, California, Kansas, Louisiana, Mississippi, New Mexico, Oklahoma, Texas: On or before May 2, 1949.

(b) With the filing of such restatement there shall be included a letter of transmittal containing a list of the material inclosed and a list of the purchasers to whom it has been mailed.

**154.84 Plan of restatement**

The restatement shall contain the provisions of schedules of rates, charges, classifications, practices, regulations and contracts effective on the date the tariff is filed. However, concurrent with the restatement, a natural-gas company may propose changes in rates, charges, classifications, services, practices, rules and regulations in accordance with § 154.63 of this part. Differences in the phraseology of schedules should be reconciled whenever possible. The effective date to be shown on the tariff sheets shall be that desired by the company, but not less than 30 days nor more than 60 days after filing pursuant to § 154.83.

***Regulations of Federal Power Commission under Natural Gas Act, Part 154, Subdivisions 1-86***

**154.85 Status of contracts filed as rate schedules and restated**

Each contract, which is now filed as an effective rate schedule, may be continued in effect and shall be considered as an executed service agreement to the extent that the provisions thereof are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff, until such contract expires by its presently provided terms or is replaced by an executed service agreement in a form contained in the tariff: *Provided, however,* That the natural-gas company, concurrent with the filing of the tariff, shall submit, for insertion in front of each such contract, a statement identifying the provisions thereof which are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff and which are to remain in effect: *Provided further, however,* That agreements intended to effect a change or amendment in such contract may be made only by the execution of a form of service agreement contained in the tariff.

**154.86 Availability of Commission staff for advice prior to formal filing**

Any natural-gas company restating its schedules in accordance with § 154.82 may informally submit a tariff or any part thereof for the suggestions of the staff of the Commission, or may confer with the staff of the Commission to obtain advice on any problem of restatement, prior to submission of the tariff to the Commission for filing and posting.

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JAN 29 1958

JOHN T. FEY, Clerk

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1958

No. ~~22~~ 23

UNITED GAS PIPE LINE COMPANY,  
*Petitioner,*  
*vs.*

MEMPHIS LIGHT, GAS AND WATER DIVISION;  
CITY OF MEMPHIS, TENNESSEE; MISSISSIPPI  
VALLEY GAS COMPANY; TEXAS GAS TRANS-  
MISSION CORPORATION; SOUTHERN NATU-  
RAL GAS COMPANY; and FEDERAL POWER  
COMMISSION,

*Respondents.*

**REPLY BRIEF OF UNITED GAS PIPE LINE COMPANY  
ON PETITION FOR CERTIORARI**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1957

UNITED GAS PIPE LINE COMPANY,  
*Petitioner,*

*vs.*

MEMPHIS LIGHT, GAS AND WATER DIVI-  
SION; CITY OF MEMPHIS, TENNESSEE;  
MISSISSIPPI VALLEY GAS COMPANY;  
TEXAS GAS TRANSMISSION CORPORA-  
TION; SOUTHERN NATURAL GAS COM-  
PANY; and FEDERAL POWER COMMISSION,  
*Respondents.*

No. 691

**REPLY BRIEF OF UNITED GAS PIPE LINE COMPANY  
ON PETITION FOR CERTIORARI**

The brief in opposition of Memphis and Mississippi filed January 27 1958 so distorts the perspective of this application that we beg leave to submit the following brief observations in reply:

1.

This petitioner's application does not deal with a "uni-lateral change" in a rate fixed by contract which was condemned by the *Mobile* decision, as erroneously asserted by respondents in their brief (br. 10). The question presented by this petitioner is whether executed service agreements *expressly providing* for price change in the manner carried out by United Gas Pipe Line Company in its rate filings, shall be enforced or are prohibited by the *Mobile* decision.

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The issue whether the executed service agreements do expressly so provide, has been determined in petitioner's favor by the administrative agency. There is therefore no excuse for respondents to misstate the question in their submission to this Court.

2.

Respondents admit our statement of the question when they say (br. 10):

"In this case United is attempting to use the identical rate-changing procedures, but this time on a different ground, viz.: that its rate contracts authorize it to invoke them."

Again, respondents concede that the "effective superseding rate schedules" provision in petitioner's executed service agreements (br. 15)

"... in effect, ... makes Commission action a part of the contract."

This is a concession which we embrace in urging that this petition be granted.

3.

In pressing the *Mobile* case, respondents assert (br. 10) that "the contract customers of United (like the contract customer of United in the *Mobile* case) have not consented to the change in the contract rates proposed by United". This is a quibble. The fact that our contract customers have not accepted the particular rate specified in the filings initiated on September 30 1955, while clearly recognized in the petition (pp. 24-5), does not dispose of the contention which we believe clearly founded in law (as well as in the facts determined by the Commission itself) that the

contract customers *have consented to the mode of contract change*. They have thus brought themselves within a well-recognized principle of law (pet. 22-4), indicated by this Court for application to natural gas company rates by its language in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.* 341 US 246, 251. It is inexcusable for respondents to assimilate the relationship of United's contract customers here to the relationship of Mobile Gas Service Corporation with the misleading words "*like the contract customer of United in the Mobile case*" (br. 10). The plain distinction is a matter of record in the *Mobile* case as well as in this case (pet. 13-4).

## 4.

Respondents' argument (br. 14-5) from certain rejected language proposed to the Commission for the form of service agreement (never executed) was fully dealt with in petitioner's reply before the Commission and there shown not to concern mutual agreement for change of rate (R. 209-10). The Commission, suggesting the language might constitute an escalation clause in violation of Reg. § 154.38 (d)(3), rejected the language. It was never a part of the form of service agreements executed between petitioner and Mississippi Valley, Texas Gas or Southern. The inferences sought to be drawn from this episode by respondents, are concluded by the determination of fact made by the Commission herein (*National Labor Relations Board v. Hearst* 322 US 101, 130) and have no bearing upon the merits of this application to the Court under Rule 19.

## 5.

Respondents argue the alleged injustice resulting from the Commission's lack of authority to suspend rate in-

creases or to require refunds in the case of customers who purchase gas for resale for industrial use only (br. 16-8). The decision to treat such sales differently represents the deliberate choice of Congress which was made for reasons grounded in the peculiar nature and consequences of such sales (see Congressman Lea's statement in the House of Representatives Cong. Rec. July 1 1937 p. 6727). The alleged injustice does not result from any interpretation of the executed service agreements here involved as respondents contend.

## 6.

As to respondents' bland assurances (br. 23-8) about the economic and social consequences of the decision below, our present application rests solely on its merits as a proposition of law. The \$9,978,000 per annum which respondents themselves concede to be at stake (br. 3) attests the economic importance of the case to this petitioner, and its effect upon sound regulatory procedure is set forth in the petition of the Federal Power Commission in No. 694 this term.

Respectfully submitted,

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*Of Counsel*

New York, January 28 1958

## CERTIFICATE OF SERVICE

We, Ralph M. Carson, Thomas Fletcher and C. Huffman Lewis, attorneys for petitioner United Gas Pipe Line Company, and members of the bar of the Supreme Court of the United States, hereby certify that we have served upon the Solicitor General of the United States, attorney of record for the Federal Power Commission, and counsel of record for each other party, a copy of the foregoing reply of petitioner to the brief of respondents Memphis Light, Gas and Water Division et al. opposing petitioner's application for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, by depositing correct copies thereof in the United States mail, first-class postage prepaid (except as to those addressees marked with an asterisk in which case air mail postage was prepaid) on January 29, 1958, addressed as follows:

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January 29 1958

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FILED

AUG 1 1958

JOHN T. FEY, Clerk

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1958

No. 23

UNITED GAS PIPE LINE COMPANY,  
*Petitioner,*  
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MEMPHIS LIGHT, GAS AND WATER DIVISION;  
CITY OF MEMPHIS, TENNESSEE; MISSISSIPPI  
VALLEY GAS COMPANY; TEXAS GAS TRANS-  
MISSION CORPORATION; SOUTHERN NATU-  
RAL GAS COMPANY; and FEDERAL POWER  
COMMISSION,

*Respondents.*

**BRIEF OF PETITIONER  
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New York, August 1 1958

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1958

UNITED GAS PIPE LINE COMPANY,  
*Petitioner,*

*vs.*

MEMPHIS LIGHT, GAS AND WATER DIVISION;  
CITY OF MEMPHIS, TENNESSEE;  
MISSISSIPPI VALLEY GAS COMPANY;  
TEXAS GAS TRANSMISSION CORPORATION;  
SOUTHERN NATURAL GAS COMPANY;  
AND, FEDERAL POWER COMMISSION,

*Respondents.*

No. 23

**BRIEF OF PETITIONER  
UNITED GAS PIPE LINE COMPANY**

This is a review by writ of certiorari issued out of this Court February 3 1958 of the judgment of the United States Court of Appeals for the District of Columbia Circuit upon a decision of that court, both dated November 21 1957 (R. 262, 272).<sup>1</sup>

The decision below, reversing an order of the Federal Power Commission in rate proceedings still uncompleted, directed the Federal Power Commission to reject as improperly filed revised sheets filed by petitioner for the purpose of superseding certain rate schedules then contained in its

<sup>1</sup>R. designates pages of the record printed pursuant to Rule 36 in No. 691 (October Term 1957), consolidated with the records in Nos. 694 and 695, pursuant to order of this Court made February 3 1958.

filed and posted tariff. This filing was pursuant to a procedure provided by service agreements theretofore entered into between petitioner and respondents Mississippi Valley Gas Company (herein called *Mississippi Valley*), Texas Gas Transmission Corporation (herein called *Texas Gas*), and Southern Natural Gas Company (herein called *Southern*), as well as other customers.

### **Opinions Below**

The Federal Power Commission's Opinion and Order No. 295 dated October 2 1956, which denied the motions (directed by the court below to be granted) of respondents Memphis Light, Gas and Water Division and City of Memphis, Tennessee (herein together called *Memphis*) and of Mississippi Valley to reject as improperly filed the new rate schedules to petitioner's filed and posted tariff, is reported at 16 FPC 19 and 15 PUR 3d 279 and also appears in R. 224. The opinion of the Court of Appeals appears in R. 262 and is reported in 250 F. 2d 402.

### **Jurisdiction**

The jurisdiction of this Court is invoked under 28 USC § 1254, subd. 1, 62 Stat. 928, and Natural Gas Act § 19(b), 15 USC § 717r(b). The order directing issuance of the writ of certiorari was made February 3 1958 355 US 938.

### **Questions Presented**

1. Does the pricing provision of the service agreements contained in a Seller's filed and posted tariff that:

"All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule [designated], or any effective superseding rate schedules, on file with the Federal Power Commission"

which are in effect between petitioner as seller and the various buyers of natural gas (including respondents here) who executed such service agreements and have accepted service thereunder, empower a change of rates made effective by (a) the petitioner's making and filing with the Federal Power Commission a new rate schedule and (b) the Commission's exercising its statutory powers of review thereon either on its own motion or on complaint of any buyer?

2. Does any provision of the Natural Gas Act render unenforceable such a pricing provision contained in an executed service agreement of a filed and approved tariff prepared in conformity with the Commission's rules and regulations promulgated under §§ 4 and 16 of the Act because the buyer had not agreed to the particular new price contained in a superseding rate schedule?

3. Does a court reviewing an order of the Federal Power Commission have authority (a) under § 19(b) of the Natural Gas Act to reverse it upon a construction of the service agreements dealt with by such order which is contrary to the Commission's finding (supported by substantial evidence) as to the intent of the contracting parties and (b) to reverse the Commission's interpretation of the service agreements of a filed and approved tariff?

### **Statutes Involved**

The relevant provisions of §§ 4, 5, 7, 15(a), 16 and 19 of the Natural Gas Act of 1938, 52 Stat. 821 as amended, 15 USC §§ 717 *et seq.*, are set forth in the appendix to this brief (pp. 1a-7a). The relevant provisions of the Regulations thereunder, *viz.* Part 154—Rate Schedules and Tariffs, §§ 154.1 to 154.86 both inclusive (18 CFR 154.1 to 154.86, hereinafter cited as Reg. 154), are set forth in the appendix at pp. 8a-41a.

## Statement of the Case

Petitioner is a natural gas company transporting natural gas in interstate commerce and holding certificates of convenience and necessity issued by the Commission under § 7 of the Act. The order of the Federal Power Commission which the Court of Appeals reversed denied objections by Memphis and Mississippi Valley to its taking jurisdiction and conducting hearings on certain revised rate schedules which petitioner filed with the Commission on September 30 1955 to take effect November 1, so far as they applied to respondents Mississippi Valley, Texas Gas and Southern.

These three respondents whose rates were affected by the new filings are buyers of natural gas under certain service agreements, Mississippi Valley being a distributor and Texas Gas and Southern being pipe line companies. The other respondent Memphis is a distributor that buys much of its natural gas from Texas Gas. It is not in privity with petitioner in any respect.

### (a) Relevant contracts in force September 30 1955.

At the date of the September 30 1955 filing petitioner had outstanding executed service agreements with Mississippi Valley, Southern and Texas Gas. There were three such agreements with Mississippi Valley, dated March 25 1955 and running until 1975 (1962 as to one) (R. 61, 67, 74). With Southern there was one executed service agreement with a 20-year term made September 3 1952 (R. 92) and also a contract dated as of May 7 1951 for a term ending in 1965 (R. 83) which on November 1 1955 was replaced by the parties with a formal executed service agreement (R. 247). With Texas Gas petitioner had an executed service agreement with a 25-year term dated August 11 1952 (R. 108) and a contract dated April 16 1945 (Monroe Field, R. 100). All the executed service agreements, six in number, contained at the proposed effec-

tive date. (November 1) of the September 30 1955 filing a pricing provision as follows:

**"Article IV [V]**

**Price**

All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule [designation], or any effective superseding rate schedules, on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached thereto and filed with the Federal Power Commission which are by reference made a part hereof."<sup>2</sup>

**(b) Proceedings and decision of the Commission on September 30 1955 filing.**

On September 30 1955, petitioner filed with the Commission, in accordance with the governing rules and regulations, 31 revised sheets to be inserted in petitioner's previously filed tariff which effected an increase of rates (R. 225). The increases were estimated to produce additional annual revenues of \$9,978,000, from jurisdictional sales. By order of October 26 1955, the Commission, acting pursuant to §§ 4, 5 and 15 of the Act, suspended until April 1 1956, the new rates (except as to industrial gas) and directed the commencement of hearings on January 6 1956 (R. 225). Pursuant to subsequent order, the new rates came into effect subject to refund on April 1 1956.

<sup>2</sup>The single contract which does not expressly contain this provision, *viz.* that with Texas Gas dated April 16 1945 (R. 100), did however contain it by implication and by operation of law as the result of a settlement tariff filed by petitioner as of August 1 1954 with the consent of Texas Gas (Opinion No. 277 issued November 2 1954 in *United Gas Pipe Line Co.*, 13 FPC ). This contract was deemed by the Commission in the proceeding here to contain the pricing clause (R. 233-4), and the Court of Appeals for the purpose of its decision accepted the Commission's view that all of the contracts contained this clause or its equivalent (250 F. 2d at 405 n. 2).

Extended hearings pursuant to the Commission's order of October 26 were held, and Texas Gas, Southern, Memphis and Mississippi Valley, among others, were granted intervention and actively participated therein. While respondents Mississippi Valley and Memphis vigorously challenged the revised rate schedules, they made no attack upon petitioner's right to file the revised rate until after this Court announced its opinion on February 27 1956 in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.* 350 US 332, affirming 215 F. 2d 883. In March 1956, claiming the authority of that decision, Mississippi Valley and Memphis moved in the Commission to reject, cancel and dismiss petitioner's filings as to Mississippi Valley, Texas Gas and Southern, and to require appropriate refund (R. 143, 162).

The Commission's Order No. 295 on October 2 1956 denied the motions with an extensive opinion, which analyzed the tariff and service agreements, pointed out the distinction between them and the single fixed-price contract in the *Mobile* case, and held that the filed and posted tariff with service agreements affords an agreed machinery of change theretofore operated by the parties (R. 224). The Commission held that the service agreements "do not fix an absolute or static rate" but "simply provide that the rate to be charged shall be the effective rate on file from time to time with the Commission" (R. 230), and that this was in accord with the understanding and intention of the parties when the service agreements were entered into (R. 235-6).

Applications for rehearing were denied November 23 1956 (R. 245).

#### (c) Judgment of the Court of Appeals.

The opinion of the court below dated November 21 1957 accepted the argument of Memphis and Mississippi Valley that the validity of the procedure of rate change

under the executed service agreements and posted tariff, pivoted upon the decision of this Court rendered in the *Mobile* case on a fixed-price bilateral contract. The Court of Appeals unanimously reversed the Commission's determination on the ground that United's revised rate schedules were the kind of unilateral change condemned by this Court's decision in the *Mobile* case.

In spite of the Commission's finding that the parties intended the pricing clause to empower United to make rate changes, subject only to the Commission's review of these changes pursuant to § 4 of the Act, and that this clause supplied the assent necessary to prevent such increase from being the prohibited unilateral change, which finding as to intent the court assumed to be correct (250 F. 2d at 405), the court below nevertheless held that the Commission lacked jurisdiction to accept such a schedule for filing and to review it under § 4(e) in the absence of a *specific agreement between the parties to the particular new rate*.

The court called the present case "a close copy of *Mobile*" in every pertinent aspect save one (250 F. 2d at 405). The single difference was the provision in the service agreement for payment under the rate schedule "or any effective superseding rate schedules on file with the Federal Power Commission" (p. 2 above), and that difference the court found not to be material.

The court held that the decision in the *Mobile* case required the seller to bring to the Commission a negotiated agreement as to the new rate in order for the Commission to accept the filing under § 4(d) and review such rate under § 4(e) (250 F. 2d at 406). Quoting extensively from this Court's analysis of §§ 4 and 5 at pp. 341-2 of 350 US, the court held that, because United had not the consent of its customers to the new rates themselves, the effect of the clause relied upon by it and its customers was no more than a consent "to the act of filing", and that therefore the Com-

mission had no power to file or to review the new schedules (250 F. 2d at 406).

Memphis, although thus successful as petitioner in the Court of Appeals, had really no standing to attack the proposed rate change under the service agreements *because not a party to any of them*. Privity as between Memphis and United was totally lacking. Mississippi Valley also was in fact an entire stranger to the executed service agreements of United with Texas Gas and with Southern (R. 83, 92, 100, 108). These points were raised by United on motion to dismiss in the Court of Appeals, but that court rejected them (a) with respect to Mississippi Valley on the ground that it was party to three of the contracts even if not to the other four and (b) as to Memphis on the ground that it would feel the immediate impact of any increase awarded (250 F. 2d at 404). Thus this mere customer of a customer was granted status by the Court of Appeals to invalidate the jurisdiction of the Federal Power Commission with respect to rate schedules to which the customer's customer was not a party.

**(d) Petitioner's new rate schedules in context of the regulatory scheme.**

The case in controversy is properly understood in the light of the administrative development of regulation under the Act which fixed the form of the service agreements and rate schedules in suit and controlled their functioning.

Upon passage of the Act in 1938 there were outstanding a multitude of bilateral contracts. Pursuant to provisional regulations issued by the Commission, these contracts and any new or amendatory contracts were filed with the Commission as rate schedules. Apart from the regulatory problems posed by the variety of price-escalation clauses in these contracts, this practice resulted in multiplicity, complexity and lack of uniformity of contractual arrange-

ments. Many clauses in these filed contracts governing such items as heat content, measurement base, tax reimbursement, etc. which affected price varied from contract to contract. Under this system even if a distributor had examined the filed contracts and compared the price he was being charged with that being charged his competitors, he might not have been able to determine accurately whether he was being discriminated against. The dilemma of the distributor was succinctly stated by one who appeared before the Commission during its hearings on the new proposed regulations in 1948:

"Nobody in the world can read all the contracts that are written and the manner in which they are written, various clauses and interpretations given, and tell what the price of a commodity is."<sup>3</sup>

For this reason, the witness urged:

"It is high time that the schedule of rates was published just like the railroads so that I can go down or anybody else can go and find out what it is going to cost me to get 1,000 cubic feet of gas delivered at a certain point."

In order to cure these defects and to carry out its statutory mandate the Commission availed of its authority under § 16(b) of the Act and on April 16 1948 gave notice of proposed new comprehensive regulations. In explanation the Commission stated in part (13 FR 2045-2046):

"The basic purpose of the contemplated modification and principal change proposed to be effected are to require rate schedules to be filed in the form of tariffs, instead of the special, individually executed contract permitted by the present rules."

<sup>3</sup>P. 187 of appendix in *United Gas Pipe Line Co. v. Federal Power Commission*, No. 216, October Term 1949, reported below 181 F. 2d 796.

A further revision was made and after due notice the Commission on September 20 1948 heard oral arguments by representatives of various gas companies. The principal contention in opposition to the regulation was that the proposed rules would disturb existing contracts and thus affect substantive rights. Thereafter further changes were made in order to meet this criticism (13 FR 6372), and on October 30 1948, by Commission Order No. 144, the new regulations were published (13 FR 6371) to become effective December 1 1948.

United sought review of Order No. 144 on the ground that the Regulations affected substantive rights by requiring change in rates in existing bilateral contracts and causing elimination of certain contract provisions. *United Gas Pipe Line Co. v. Federal Power Commission* 181 F. 2d 796 (D. C. Cir. 1950). The Commission contended that the Regulations were a valid exercise of its rule-making power, were legislative in nature, and did not impair substantive contractual rights. The court refused to accept petitioner's contentions, and apparently relying on the statement of the Commission that the Regulations operated prospectively only, dismissed the petition for review.

This Court denied certiorari, 340 US 827 (1950). The result has been to leave in operation for the last eight years the regulatory scheme comprising service agreement and tariff with rate schedules out of which the present controversy arises.

*Effect of Regulations Part 154.* The primary purpose of the new Regulations was to prevent discriminations which would be contrary to § 4(b) of the Act. The Commission in its 1949 report observed (p. 111):

"The supplementation of filed contracts by additional agreements and the filing of new contracts in time multiplied the complexity of already complicated rate schedules. In addition, the results of the many indi-

vidual negotiations seemed to be departing further from the statutory requirement of no discrimination."

It described the benefits of the new Regulations as promoting uniformity, obtaining a simplified statement of rates, and lessening the work involved in evaluating future changes in rates (30th Annual Report Federal Power Commission 1950 p. 115). Also important was the elimination of escalation clauses and percentage price clauses in the original bilateral contracts. These clauses were regarded by the Commission as an attempt to make rate changes automatic because, as the contracts were filed, they became "rates". The Commission might thus be deprived of an opportunity to review the new rates before their effective date as the Act permits.

Under these Regulations, in lieu of the bilateral contractual relations between buyer and seller there was substituted a general gas tariff which the Commission described as follows (Reg. 154.14):<sup>4</sup>

"The term 'tariff' or 'FPC gas tariff' means a compilation, in book form, of all of the effective rate schedules of a particular natural-gas company, and a copy of each form of service agreement."

Thereafter the relations between the natural gas company seller and its particular customers were formalized in an executed service agreement following the form contained in the tariff, and the price of gas to be delivered thereunder was determined by the rate schedules for the respective classes of service and the general terms and conditions applicable thereto.

The disputed clause in the six executed service agreements between petitioner and three respondents (*not* Mem-

<sup>4</sup>This abbreviation refers to Part 154 of the Commission's Regulations issued October 1948 in Order No. 144, 13 FR 6371.

phis) refers to "any effective superseding rate schedules, on file with the Federal Power Commission". They are in the form contained in petitioner's FPC gas tariff, prepared strictly in accordance with the Regulations upon consultation with the staff of the Commission (Reg. 154.25) and thereafter filed with it and posted in accordance with the Regulations. This procedure included notice to each customer affected and opportunity to each customer for comment (Reg. 154.16, 154.27).

*Nature and effect of September 30 1955 filing.* Petitioner's superseding revised sheets were supported by the voluminous data required by Reg. 154.63, comprising two volumes each of several hundred pages, and were posted and served on each of petitioner's 47 purchasers (as listed) pursuant to Reg. 154.16.

The 31 superseding revised sheets effected a general rate increase which, as stated in the explanatory accompanying material, was justified and necessitated by the increased costs of rendering service. The older rates had been based on 1952 costs as adjusted while the new rates were based on cost of service for the 12-months period from May 1 1954 through April 1955 adjusted for known and measurable changes which would become effective within seven months from April 30 1955. The new rates were designed so that each class of service (town border and pipe line) in each of the three rate zones where petitioner's rates are subject to the Commission's jurisdiction would provide revenues approximating the costs of service allocated to each class of customers in each zone.

The two volumes filed in support of the superseding revised sheets set forth basic information which the Commission deemed essential for the performance of its administrative duties. The Commission could under § 4(e) of the Act review the new rate to determine whether it was "just and reasonable". In the exercise of its administrative powers it had worked out certain formulae for determining

a just and reasonable rate, which had been sanctioned by this Court in cases such as *Federal Power Commission v. Hope Natural Gas Co.* 320 US 591, 605.

In support of the new rates petitioners set forth in Statements A through N filed in conformity with requirements of Reg. 154.63 the detailed information and statistics relating to over-all cost of service, rate base and return, cost of plant, accrued depreciation, depletion and amortization, working capital, rate of return, gas operating revenues and sales volumes, revenue deductions, allocation of over-all cost of service, allocation of cost of service by zones, comparison of estimated revenues with cost of service, balance sheet, income statement and principal determinants essential to test the reasonableness of the rate. There was thus made available to the Commission, in the form in which it required, the information necessary for it to enter upon its administrative powers of review.

Each of petitioner's 47 immediate purchasers, including Mississippi Valley, Texas Gas and Southern (but of course excluding Memphis), rendering service in 248 localities, therefore also had available to it all the information which the Regulations called for as reasons for and justification of the new rate. Each purchaser had opportunity to investigate, since the new rate could not become effective for thirty days under § 4(d) of the Act unless the Commission otherwise ordered.

✓ The method thus followed was the same as that by which prior rate changes had been effected by United (R. 235) and by other natural gas companies under filed and posted tariffs.

### Summary of Argument

The decision below errs radically in applying selected phrases from *United Gas Pipe Line Co. v. Mobile Gas Service Corp.* to a situation for which they were never devised. Whereas the *Mobile* case dealt strictly and only with a fixed-

price bilateral contract, the Court of Appeals has mistakenly transferred language of the Court in that opinion adapted to the facts before it, in disregard of the true rationale of the case, to the widely different situation here presented. The contractual scheme at bar is one for flexible (not fixed) prices keyed to a public posted tariff, the rate schedules in which were adopted by the parties through executed service agreements.

This instrumentality of executed service agreement referring in its price clause to a filed and posted tariff with rate schedules and other "general terms and conditions", is an administrative development worked out by the Federal Power Commission during the last ten years through the medium of the Regulations (Part 154). The Regulations were made pursuant to statutory powers and in fulfillment of the mandate of the statute to eliminate discrimination. The legal relationship between the parties to each executed service agreement falls into the well-authenticated pattern of the posted price cases, *vis.* a contract in which the pricing provision refers to some agreed external standard. Here the external standard is found in the statutory provision for justness and reasonableness together with the statutory review powers of the Commission. The parties by the executed service agreements have adopted the mechanism which the statute affords for testing the new rates initiated by the seller from time to time.

The same tariff schedules intended by the parties as the repository of a flexible price are in addition mandated by the Regulations. The Commission's construction of the executed service agreements in this sense is supported by all the evidence and is binding. To strike down this system and destroy § 4 of the Act as the medium of price change, would be not only contrary to the statute but prejudicial to rate regulation thereunder.

## POINT I

**THE EXECUTED SERVICE AGREEMENTS BOTH (A) EXPRESS THE CONSENT OF THE PARTIES TO THE MODE OF PRICE CHANGE WHICH PETITIONER HAS INITIATED AND (B) DESIGNATE PETITIONER'S FILED RATE SCHEDULES AS THEY MAY STAND FROM TIME TO TIME AS THE SOURCE FOR DETERMINING THE PRICE THE BUYER HAS AGREED TO PAY.**

This Court's reasoning and its decision in the *Mobile* case, the sole authority invoked below to strike down the mode of price change which the parties had adopted and were in the process of putting into effect, expressly left intact the contractual powers of the natural gas companies. Their capacity to make rates and contracts and to change them from time to time, said the Court, is presumed by the Natural Gas Act and is not affected by it (350 US at 343).

It is our contention that the operative words in the six service agreements here, *viz.* those calling for payment "under Seller's Rate Schedule [with designation] or any effective superseding rate schedules, on file with the Federal Power Commission", when correlated with a filed and posted tariff, are explicit contractual provision for the method of change approved by the Commission. *In the first place* both petitioner and the respondent buyers, when executing these long-term service agreements, being fully aware of the statutory and regulatory significance of the language, intended thereby to invoke the machinery for rate change it described. The language quoted provided for rate changes to become effective by petitioner's initiating a superseding rate, filing it under § 4 of the Act, and complying with the posting and filing requirements of the Regulations, subject to the action of the Commission in the exercise of that agency's statutory functions. In this phase the views and rights of the other contracting parties would receive

their due consideration in accordance with the standards of the statute. *In the second place*, the reference of the parties to the rate schedule or any effective superseding rate schedules on file, obviously points to and designates the filed rate schedule of the seller, as it may stand from time to time, as the repository of the price and source from which it can be determined. The buyer by executing this service agreement agreed to pay the price so posted, designated and ascertained.

#### **A. The import of the words in the context employed**

The price provision that gas shall be paid for under "Seller's Rate Schedule . . . or any effective superseding rate schedules, on file with the Federal Power Commission" must in the minds of the signatories have imported a method of price change. These words appear in a service agreement of long duration—20 or 25 years—for which it is most improbable that the contracting parties would have assumed to fix an undeviating rate notwithstanding all changes in price indices, the business cycle, the volume of demand, or the supply of gas. The phrase "any effective superseding rate schedules" clearly indicates an intention that the designated rate schedule would be replaced and that the price terms of a superseding rate schedule would govern. The second sentence of the price provision which states "such rate schedules . . . are by reference made a part hereof" by this plural reference incorporates not only the designated rate schedule but also "any effective superseding rate schedules".

Moreover the phrase is given a special and decisive meaning by the environing Regulations and the statute whose procedures it contemplates.<sup>5</sup> In *Gillarde Co. v. Joseph Mar-*

<sup>5</sup>The Regulations, because reasonably related to the purposes of the Act, have full force of law: *Atchison etc. Ry Co. v. Scarlett* 300 US 471, 474, rehearing denied 301 US 712; *Columbia Broadcasting System v. United States* 316 US 407, 417; *United States v. Shaughnessy* 347 US 260, 265.

*tinelli & Co.* 168 F. 2d 276 (CA 1 1948), modified on rehearing on other grounds 169 F. 2d 60 (CA 1 1948), cert. denied 335 US 885, the court held that the words "rolling acceptance final", as used in a contract for shipment of goods under the Perishable Agricultural Commodities Act, are to be interpreted in the light of the regulations issued under that Act even though not expressly defined in the regulations. The court said (p. 280):

"When terms which have been given a definite meaning under the Act are used by licensees, in transactions governed by the Act, it can not later be maintained that a different meaning was intended."

Compare *Mastro Plastic Corp. v. National Labor Relations Board* 350 US 270, 279 (union promise to "refrain from engaging in any strike" held to require a narrow construction "in the light of the law relating to it when made").

Here the key words "any effective superseding rate schedules, on file with the Federal Power Commission" are words of art found in the statute and Regulations, and plainly have in view—

(1) some future change upward or downward in rates;

(2) notice of the change by "*filing* with the Commission . . . new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect" (§ 4[d]) and submission of the material required by Reg. 154.63 for the "*filing* of any tariff . . . or part thereof which changes or *supersedes* any tariff . . . or part thereof *on file with the Commission*" (Reg. 154.63[a]);

(3) the statutory powers of the Commission after the "new schedule is *filed*" to suspend the new rate for a period not longer "than five months beyond the time when it would otherwise go into effect"; to review, determine the lawful-

ness of the new rate, and "make such orders with reference thereto as would be proper in a proceeding initiated after it had become *effective*"; and to assure appropriate refund through the seller's furnishing a bond where the new rates have been "*made effective*" by lapse of the prescribed time for completion of the Commission's review (§ 4[e]);

(4) the fact that no gas company "may effectuate a change in an *effective* rate or charge except in the manner provided in section 4 of the Natural Gas Act, as amended, and the regulations in this part" (Reg. 154.38[d][3]);

(5) the fact that no gas company may charge a rate "different from those prescribed in its *effective* tariff and executed service agreements on file with the Commission, unless otherwise specifically provided by order of the Commission" (Reg. 154.21) (*italics supplied*).

That this language in the service agreements was intended to permit sellers to provide for price change is supported by the administrative history of the Regulations. As originally proposed (Federal Register, April 16 1948, 13 FR 2048), the Regulations prohibited natural gas companies from including in their tariffs automatic price escalation clauses by the following provision, which is a part of present Reg. 154.38(d)(3):

"No rule, regulation, exception or condition, such as tax, commodity price index, wholesale price index, purchased gas cost adjustment clauses or other similar price adjustments or periodic changes shall be included in the rate schedule or any other part of the tariff which in any way purports to *effect the modification* or change of any rate or charge specified in the rate schedule, or the substitution therefor of any other rate or charge . . ." (*italics supplied*)

When argument was heard on the proposed Regulations before the Commission on September 20 1948, one of the two chief criticisms of the natural gas companies was di-

rected at this provision, which was thought to impair automatic adjustment clauses of existing contracts (13 FR 6372). The Commission met this criticism by adding the following two provisos to Reg. 154.38(d)(3):

*"Provided, however, a natural-gas company may state in the service agreement or in rate schedules filed pursuant to § 154.52 that it is or will be its privileges under certain specified conditions, to propose to the Commission a modification, change or substitution of the then effective rate or charge: Provided further, that no such clause may effectuate a change in an effective rate or charge except in the manner provided in section 4 of the Natural Gas Act, as amended, and the regulations in this part."*

In explanation of this amendment the Commission said (13 FR at 6372):

*"Further modification permits the inclusion in filed service agreements and certain rate schedules of statements of policy by natural-gas companies concerning changes in rates through the application of 'adjustment' provisions. However, no provision of this type, whether now on file or which may be filed in the future, may operate, of itself, to change an effective rate or charge. Such changes must be accomplished by the filing of new rate schedules in the manner provided in section four of the Natural Gas Act, as amended, and these regulations." (italics supplied)*

The Commission thus by its Regulations sanctioned provisions in service agreements for change of rates but required that the change be accomplished through § 4 so that its authority to review rates would not be infringed by an automatic adjustment.

This conclusion is further apparent from the Commission's own interpretation of its Regulations made December 20 1948 in denying rehearing thereon:

"The right of a natural-gas company, as given by the Natural Gas Act, to make changes in filed rate schedules, tariffs and contracts is preserved, as it must be. The amended regulations do, however, impose certain conditions which must be satisfied by any natural-gas company which proposes to change any such filed rate schedule, tariff or contract. Among other things, it must (1) give adequate notice as required by Section 4(d) of the Act and Sections 154.16 and 154.22 of the regulations, including service upon each affected customer; and (2) furnish to the Commission information as to the reasons and justification for the proposed change, as required by Section 154.63 of the amended regulations. Moreover, Section 154.27 permits affected customers, and other interested parties, to submit comments concerning such proposed changes, without limitation of any right to protest or complain."<sup>8</sup>

United Gas Pipe Line Company, which had contracts containing automatic escalation clauses, opposed the new Regulations on the ground that the elimination of such clauses was an impairment of substantive contract rights. *United Gas Pipe Line Company v. Federal Power Commission* 181 F. 2d 796, cert. den. 340 U. S. 827. The industry was aware of United's attack on Order 144 as infringing its rights to these contracts. It was also aware of the Commission's position and of its ultimate success in securing dismissal of United's petition to review Order 144 for the reason that it was held not to affect substantive rights. It was not until July 1952, however, that United in the conversion tariff withdrew its opposition to the Regulations. This record of opposition by United to regulations that might be construed to prevent price changes makes it even clearer that the words "any effective superseding rate sched-

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<sup>8</sup>P. 275 of appendix in *United Gas Pipe Line Co., v. Federal Power Commission*, footnote 3 above.

ules" in the United form of service agreement serve the purpose of insuring flexibility in the rates.

In opposing certiorari Memphis and Mississippi Valley argued from certain language originally tendered by petitioner to the Commission for insertion in the tariff, which language the Commission rejected and which therefore never appeared in the service agreement, that the "effective superseding rate schedules" provision in itself was realized by petitioner to be insufficient to authorize a change of rate (br. 15). Such argument lacks foundation for several reasons. Essentially the rejected language was interpreted as seeking to bind the Commission to an *automatic* alteration of rate concurrent with any subsequent increase in the seller's cost. It was a restatement of automatic escalation clauses in certain underlying contracts which the Commission by the new form of general tariff was seeking to eliminate. It was called "a rate escalator provision" by the Commission in its letter to United dated June 27 1952, and was said to be in contravention of Reg. 154.38(d)(3) which prohibited the inclusion of an escalation clause in the "rate schedule or any other part of the tariff" (R. 283). The form of service agreement is made a part of the tariff by Reg. 154.14. Hence United could conclude only, and it did conclude, that the Regulations were interpreted and would be applied by the Commission to exclude the phraseology in question, not only from the General Terms and Conditions of the tariff but from the form of service agreement also.

Respondents' attorneys in opposing certiorari interpreted the exchange of letters in the same way stating:

"... the Commission objected to the quoted provision as an attempt by United to reserve the right to *change the rates automatically*, contrary to the Commission's regulations" (p. 15; italics supplied).

United by its letter of July 3 1952 to the Commission thus agreed to remove the language (R. 288). United felt that it was unnecessary to substitute any additional language because the words "or any effective superseding rate schedules" already in the form of the service agreement were sufficient to authorize United to file rate changes. The phrase was already a term of art in industry practice; for example Ohio Fuel Gas Company as early as 1945 had in its filed tariff a pricing provision which called for payment under a designated rate schedule "or any superseding Rate Schedules of Seller included in the Tariff on file with the Federal Power Commission". This was one of the companies whose similar pricing clauses have been treated by the Commission as authorizing rate increases in exactly the manner employed by United in the present instance (p: 53 below).

Thus, quite apart from the fact that the rejected language was never part of any negotiations with the buyers, the episode has no significance with regard to the intended operation of the pricing clause reference in the form of service agreement as finally approved by the Commission and executed by buyer and seller.

**B. Independent status of rate schedules in posted and filed tariff designated by service agreements**

The reason that the parties in the executed service agreement pointed to the tariff with the identifying words "Seller's Rate Schedule . . . or any effective superseding rate schedules, on file with the Federal Power Commission" is that by virtue of the Regulations the rate schedules in the tariff had acquired an independent status as the *locus* for the price of service. It was to such schedules that distributors like the witness above quoted (p. 9 above) would naturally have recourse as the source of information as to rates. They were a repository for prices and terms appli-

cable to stated classes and areas, a kind of public bulletin board.

These rate schedules were designed to organize a wilderness of separate trades into an orderly directory or central exchange for rates equally applicable to all customers of the same class. Prices were generalized into a series of quotations open to all customers in the area according to their class. It remained true that rates initially determined upon the opening of new facilities, and also existing rates previously determined and announced, would from time to time have to be changed upward or downward to conform to the statutory norms of justness and reasonableness. However, the room for individual initiative on the part of the seller with respect to rate changes was made by the 1948 amendment to the Regulations a limited and narrow one. The Commission had determined in the exercise of its statutory powers to confine the pricing practices of natural gas companies to the filed tariff (Reg. 154.2f), to require posting thereof (Reg. 154.16), to control carefully the form and composition of the tariff and the composition of the rate schedules (Reg. 154.31-41), to specify the material required to be submitted with any initial rate schedule (Reg. 154.62), and to regulate with meticulous description the material to be submitted with *changes* in a tariff (Reg. 154.63). The description of material required for such a change is ten times as long as that required for an initial filing. All the procedures of the seller are thus firmly controlled by the Commission through the Regulations which even warn of the Commission's reserved right to reject material submitted for filing which fails to comply with the applicable requirements (Reg. 154.24; cf. *Mississippi River Fuel Corp. v. Federal Power Commission* 202 F. 2d 899 at 901 [CA 3 1953], cert. denied 345 US 988).

Hence the regulatory design was (a) a service agreement stating the term of service and broad governing conditions

and (b) a complementary but distinct and independent series of rate schedules stated to be available to each member of the class coming within each rate schedule. It was the design of the rate schedules that (i) they should contain all information necessary to compute the price and (ii) they should be flexible. They were required to contain not only the dollars and cents price per unit (Reg. 154.38[d][1]) but "all terms, conditions, classifications, practices, rules and regulations" affecting the rate (Reg. 154.11). The rate schedules thus enable the purchaser to determine quickly and accurately at a single source the price to be paid by him or by others. Their flexibility permitted the seller to make a price change by altering a single instrument rather than many contracts.

The division of the tariff into component parts of service agreement forms on the one hand and rate schedules on the other, reflected the fact that a rate order "is not an order for all time", to borrow the language of *Federal Power Commission v. Hope Natural Gas Company* 320 US 591, 615. By the same token, the service agreement which defined the basic relations between buyer and seller was required to be executed, whereas the rate schedules were to be supplied by the seller *ex parte*. The Regulations, while recognizing that flexibility of rate was inevitable, specifically excluded from the permissible scope of the service agreement any matter bearing upon determination of the rate or any superseding rate. The change of rate was to be effected through a change of the rate schedule exclusively. Reg. 154.40 entitled "Composition of service agreement" requires an unexecuted copy of each form of service agreement to be submitted as part of the tariff. It stipulates what items are to be provided for in the service agreement forms; *viz.* name of purchaser, service to be rendered, area to be served, maximum obligation to deliver, delivery points, delivery pressure, applicable rate schedules by reference to

the tariff, effective date and term, identification of any prior agreements being superseded.

Hence, for example, one of the Mississippi Valley service agreements of March 25 1955 in its price clause refers to seller's rate schedule DG-J (R. 74, 74d) which is on file as a rate schedule available to *any natural gas distributor* for purchase of natural gas from United Gas Pipe Line Company for resale in a Billing Area Unit in seller's Jackson Rate Zone (R. 299-301). This rate schedule describes the character of service to which it is applicable and contains other detailed provisions governing price which are described below. The quantities called for are defined by the service agreement in Article II and Article III (R. 74b-74d).

The price is indicated in the rate schedule not simply as a figure of rate per mcf but as (1) a rate of 20 cents per mcf for gas delivered during the month up to the number of mcf obtained by multiplying the billing demand for the month by eight, and (2) a rate of 15 cents per mcf for all gas delivered in excess of the number of mcf billed at 20 cents per mcf (R. 299). Neither of these rates is determinative of price unless considered in conjunction with other provisions of the rate schedule. First the basic volume of gas must be determined by the measurement of a cubic foot of gas delivered under conditions of pressure and temperature stated in the General Terms and Conditions § 1.3. From this basic measurement, the billing demand is determined as required in § 5 of the rate schedule. The rates above after being applied to the volume delivered must then be tested to determine whether the resulting amount meets the provisions of the minimum bill section of the rate schedule.

Other rate schedules, as for example rate schedule PL 3, contain additional terms affecting price such as the section providing for an adjustment for undehydrated gas (R. 15).

In the context of the Regulations, we submit the contracting parties knew exactly what they were doing when they executed the service agreements. They knew the meaning of the terms used. They had full opportunity for informal submissions by the seller (Reg. 154.25) and comments by the "purchaser or other interested party" (Reg. 154.27).

To say that the interpretation contended for by petitioner "is not one which was contemporaneous with the execution of the contracts" (Memphis brief in opposition to certiorari, p. 14) is wholly incorrect because the Regulations themselves are contemporaneous evidence of the most compelling kind. The tariff having been once filed and approved, the parties were bound to contract in the form and framework set by it and by the Regulations. They realized that such change in the rate schedule as the Commission should find to be justified by costs and should permit to become effective under § 4 of the Act, would be equally obligatory and binding on both parties. Reg. 154.21 ("Effective Tariff") prohibits natural gas companies from demanding, charging or collecting any rate different from those prescribed in its effective tariff on file with the Commission, in the absence of a special order of the Commission. No natural gas company can claim a rate as a legal right that is other than the filed rate, as pointed out in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.* 341 US 246, 251. The buyer also had no choice but to pay the new rate. The fact that the framework and terminology of the contract was largely imposed by the Regulations through Order 144 explains the form of expression used by the parties in providing for flexibility of rates, without derogating from their purpose and intention to that end as testified to by them and found by the Commission.

This independence of the rate schedules is illustrated by the specific provisions of § 7 of the Act. Subdivision (a)

provides that in an appropriate case the Commission may by order direct a natural gas company "to extend or improve its transportation facilities . . . and sell natural gas to, any person or municipality . . . engaged . . . in the local distribution of natural or artificial gas to the public . . ." The exercise of authority under this provision contemplates no contract or service agreement. Doubtless one might be executed. If it were not however the service, in an appropriate case, could be compelled; the legal theory of obligation would be *quantum valebat*; and the payment due would be determined by the applicable rate schedule currently on file. When and as such rate schedule was superseded by an effective new rate schedule the new rate would govern.

A similar situation was envisaged by Congress in the prohibitions of §7(b) against abandonment by a natural gas company of all or any portion of its facilities or any services rendered thereby without the approval of the Commission after due hearing. Even in the case of performance under an executed service agreement, it is clear that the expiration of that agreement would find the seller in the position of rendering compulsory service to the extent that §7(b) should be applied. Such service might well be without any contract at all. Again, the rate schedule currently on file as part of the posted tariff would prevail. Cf. *Panhandle Eastern Pipe Line Co. v. Federal Power Commission* 236 F. 2d 289, 290, 294 (CA 3 1956).

These illustrations merely reinforce the point that in the evolution of administrative control through the Regulations, the material terms of the contract between buyer and seller have become in reality pre-determined by the Commission's requirements. This fact it is which gives the rate schedule and any effective superseding rate schedules described in the service agreement their independent vitality recognized by the parties in this case.

It would seem also to be recognized by this Court in both the *Mobile* case and the *Montana-Dakota* case. In the

*Mobile* case, although no part of the *ratio decidendi*, the Court said the obvious implication from the continuing undisturbed capacity of natural gas companies to make rates and contracts and to change them from time to time was that the companies would continue to possess their original powers. (350 US at 343):

"to establish *ex parte*, and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer".

In this differentiation the latter division is illustrated by the fixed-price contract with Mobile Gas Service Corporation which alone was involved in that case. The first half on the other hand would appear to be an apt description of the mechanism for rate change embodied in the filed and posted tariff with rate schedules, executed service agreement, and statutory review powers of the Commission.

Earlier, in the *Montana-Dakota* case this Court described as the only legal rate of a natural gas company the filed rate "whether fixed or merely accepted by the Commission" (341 US at 251). This recognition of the rate schedule as the measure of the seller's legal right to payment for services, again explains why the parties in the service agreement would adopt it as a register of price determinants.

Again in *Portsmouth Gas Co. v. Federal Power Commission* 247 F. 2d 90 the Court of Appeals for the District of Columbia Circuit treated a unilateral change made with Commission approval in a filed rate schedule as subject to be confirmed by the buyer's acquiescence (p. 94). This holding followed quotation by the court of this Court's language in the *Mobile* case 350 US at 343, concerning *ex parte* rates (p. 93). It was assumed for the sake of argument that the form of service agreement comprised in the tariff filed to take effect March 1 1954 contained the

"any effective superseding rate schedules" language (p. 93). The holding therefore means that the seller's unilateral change in a rate schedule pursuant to such a clause could not deprive the Commission of jurisdiction to review the new rate, since an absence of jurisdiction would have made the buyer's acquiescence immaterial. Yet in the case at bar the same court has held that a change in rate schedule pursuant to a similar clause conferred no power on the Commission to review the new rate.

### **C. The intention expressed by the parties and found by the Commission**

The expression of intent by the parties to the contracts is clear, to the effect we have described.

Petitioner's statement in the Commission proceedings that the intent and meaning of the "effective superseding rate schedules" phrase, as understood by the parties, was to give the seller the right to change rates, where reasonably required to meet the statutory standards of justness and reasonableness, with the correlative right in the other contracting parties to oppose the change by the same standard (R. 180), was concurred in by Texas Gas (R. 171-4). Its counsel took the same view on oral argument in the Commission (R. 3).

Southern in its pleadings described the language in question as meaning that it was to

"pay United rates set out in United's applicable rate schedules and that such schedules may be changed by United under the procedures established under Section 4(d), subject to supervision and review by the Commission under Sections 4(e) and 5(a)" (R. 169).

Southern added (R. 169):

"Such was Southern's intention when it executed said service agreements".

Southern also referred to the consistent, tacit construction by the Commission and the industry of identical or similar service agreement provisions as according the seller similar right to change rates on filing, hearing, and Commission approval (R. 170). Its counsel took the same position on argument before the Commission (R. 4).

Mississippi Valley, while not conceding the same understanding and intention as the other contracting parties, did not contradict or deny their statements. It confined its argument to the question of power and validity claimed to arise from this Court's decision in the *Mobile* case (R. 146-7, 192-3).

On the basis of the record before it, the Commission found that practically all customers of petitioner (including Mississippi Valley) have acted through the years in accordance with the contractual purpose and intent entertained by Texas Gas and Southern (R. 235). Such practical interpretation by the parties is deemed of great, if not controlling influence. *Old Colony Trust Co. v. Omaha* 230 US 100, 118; *District of Columbia v. Gallaher* 124 US 505, 510; *Topliff v. Topliff* 122 US 121, 131.

With respect to the pricing clause in the service agreements before it the Commission decided:

"The words 'or any effective superseding rate schedules on file with the Federal Power Commission' clearly contemplate the understanding and intent of the contracting parties that changes could properly be made by United in the rates contained in the applicable rate schedules in effect at the time of execution of the service agreement. It is equally clear that it was the understanding and intent of the parties that the purchaser would pay the rates set out in the applicable rate schedules effective from time to time and that changes could be made therein by United under the procedures established under section 4 of the Act." (R. 231)

"[After a description of the conduct of various parties including Southern and Texas Gas] And these parties, as well as practically all other customers of United, have acted through the years in accordance with this contractual purpose and intent.

The contracting parties are in complete agreement as to the meaning and purpose of their contracts." (R. 235-6)

In its construction of the meaning of the service agreements, the Commission was very clear. It said that the pertinent agreements as in effect September 30 1955 (R. 230)

"... do not fix an absolute or static rate. Rather, these latter agreements simply provide that the rate to be charged *shall be the effective rate on file from time to time with the Commission.*" (italics supplied)

The Court of Appeals completely misses the significance of this interpretation. It does not discuss the intent of the parties as testified to by them or found by the Commission. Nor does it discuss the meaning and purport of the relationship set up between the parties by the service agreement. The court adopts the puzzling view that some of petitioner's "customers may have consented to the act of filing" (250 F. 2d at 406). There is nothing in the testimony or findings to show that the purchasers bent their attention upon the act of filing. What the customers consented to—what the Court of Appeals should have realized was the subject of their accord—was the substitution of the superseding rate for the former rate upon its becoming "effective" pursuant to the procedures which the Act empowers and describes. What the purchasers intended (as found by the Commission at R. 235, quoted by the Court of Appeals itself at p. 405 of 250 F. 2d) was "to grant United the power to make changes in rates pursuant to Section 4(d)

... " Unless directed to such end the act of filing was a sterile business and consent thereto would have been meaningless.

To say that by this agreement the parties attempted to "create . . . statutory procedures" (Memphis brief in opposition to certiorari, p. 10) and to say that thereby they "empower the Federal Power Commission to exercise a rate-changing function which Congress has not granted it" (br. 10), is a complete misstatement of both the testimony and the findings. The parties attempted no such thing. They could not do so and did not need to do so. Similarly, it is beside the point to argue (br. 11) that "no agreement of the parties can create [an administrative] rate-changing procedure". The Commission realized that its review under § 4 which was interrupted by the motions of respondents to dismiss, was not a rate-changing procedure; that the statutory powers exercised by it in suspending petitioner's new filing had not been conferred by agreement; that its acceptance of the filing also had not been conferred by agreement; and that what the agreement of the parties concerned was the applicability to their transactions of the new filed rate, when and if it should become effective following the Commission's review.

Indeed, the Commission so found the agreement of the parties as to the effective rate in the passage just above quoted, and this Court should treat the finding in these circumstances as determinative (pp. 49-53 below). The Court of Appeals, we submit, did not understand it.

#### **D. Distinction of *Mobile* case from this case.**

What the Court of Appeals said was that, except for the pricing clause, the present case is "a close copy of *Mobile*" (250 F. 2d at 405). Vital as is the distinction imported by the pricing clause, this statement of the Court

below is in other respects also a measure of its misapprehension of the total disparity between the two cases.

As this Court knows, the *Mobile* case presented the single question of what the Court held to be a unilateral change by the seller in its ten-year contract to supply to the buyer gas for resale to Ideal Cement Company at a specified price (350 US at 336). This price was substantially lower than that for other gas furnished by the seller. The contract in question was Supplement No. 10 to Supplement No. 7 of a general contract between the parties dated January 1 1936.

Supplement No. 10 consisted of an exchange of letters between the parties June 28 and July 30 1946 specifying a specially low rate for a ten-year period from the beginning of deliveries under certain contract rates so that the buyer might resell at a price agreed upon by it with Ideal Cement Company for the same period (pp. 90-5 of *Mobile* record). No right to change the rate during the ten years was reserved (pp. 93-4 of *Mobile* record). This special contract for the benefit of Ideal received Commission approval September 17 1946 (pp. 56-7 of *Mobile* record).

Although the United-Mobile contract became a part of United's filed schedules of rates and contracts, it continued unchanged as an independent bilateral agreement for a fixed term (215 F. 2d at 884-5 n. 3; 350 US at 336). Mobile's petition to modify and amend United's new filings attacked the increase of rate only "in so far as said Sheets apply to sales to Mobile for resale to Ideal Cement Company . . . because said Revised Sheets seek to effect a unilateral increase in existing rates for natural gas fixed by a firm contract between United and Mobile . . ." (p. 8 of *Mobile* record). It was the denial of this petition which Mobile brought up for review to the Court of Appeals and which thus came to this Court (pp. 95-103 of *Mobile* record). By deliberate choice Mobile limited its attack to the rate fixed by the Ideal contract. This clearly appears from the

Commission's Opinion No. 277, approving United's settlement tariff on October 26 1954 (*In the Matter of United Gas Pipe Line Company*, Docket No. G-1142, etc.), which points out Mobile's approval of every item in United's rate schedules except the rate for resale to Ideal Cement Company. This position was taken by Mobile well after the Third Circuit had on September 7 1954, 215 F. 2d 883, confirmed its objections to the change in the rate for resale to Ideal.

The narrow frame of the issue so tendered to this Court (350 US 332) contrasts sharply with the entirely different structure of tariff and executed service agreement present in the case at bar, the significance of which the Court of Appeals failed to appreciate.

## POINT II

**JUDICIAL INTERPRETATIONS OF THE NATURAL GAS ACT AND RECOGNIZED PRINCIPLES OF CONTRACTUAL CONSTRUCTION REQUIRE THAT THE SERVICE AGREEMENTS BE CONSTRUED IN ACCORDANCE WITH PETITIONER'S CONTENTIONS.**

In addition to the fact that the service agreements herein expressly provide for the method of price change employed by petitioner, basic principles of statutory and contractual construction establish the validity of petitioner's construction of these service agreements.

### **A. Available judicial interpretation of statutory standards**

At the time of adoption of the "any effective superseding rate schedules" formula for price change in these service agreements, the parties as regulated natural gas companies, with rates constantly under review in the Com-

mission and counsel observant of developments in the law, must have known of the approved tests and standards of reasonableness and fair return, expressed in such cases as *Federal Power Commission v. Hope Natural Gas Co.* 320 US 591, 603, 605 (1944); *Colorado Interstate Gas Co. v. Federal Power Commission* 324 US 581, 605 (1944); *Federal Power Commission v. Interstate Natural Gas Co.* 336 US 577, 581-2 (1949).

The opinions in these cases, while recognizing that the natural gas company could initiate changes in rates pursuant to the provisions of Section 4, exhibit what the limits would be for permissible rates under regulation. They indicated that the seller might properly stipulate and receive a fair or reasonable rate above the level of the barely compensatory rate. In the *Hope* case this Court pointed out the balancing of interests required for the attainment of just and reasonable rates (320 US at 603):

"The rate-making process under the Act, i.e., the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests. Thus we stated in the *Natural Gas Pipeline Co.* case that 'regulation does not insure that the business shall produce net revenues.' 315 U. S. p. 590. But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. Cf. *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U. S. 339, 345-346. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit

and to attract capital. See *Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Commission*, 262 U. S. 276, 291 (Mr. Justice Brandeis concurring) . . ."

With these limits indicated and the requirement of filing and Commission review in any event, what more natural and inevitable than that the contracting parties, in stipulating a machinery of price change, should adopt the standards of the Act as enforced by the Commission in accordance with the Regulations? To call such reference an arbitration, as did the court below (250 F. 2d at 407), is a total misconception (p. 47 below).

#### **B. Bearing of recognized legal principles on interpretation**

Not only is it required by the evidence and contemplated by the administrative history that the significance we claim for the words "any effective superseding rate schedules, on file with the Federal Power Commission" should be given to them; but to treat them as does the Court of Appeals as having no significance and constituting empty description, is contrary to well-settled rules of interpretation. A contract should be construed, where possible, to give effect to every word, phrase, clause and sentence. *Ladd v. Ladd* 8 How. 10, 28; *Nicolson Pavement Co. v. Jenkins* 14 Wall. 452, 456; *O'Brien v. Miller* 168 US 287, 297; *Carpenter v. Texas & New Orleans R. Co.* 89 F. 2d 274, 277 (CA 5 1937), cert. denied 301 US 703. The necessary implications of a contract viewed in its entirety are not to be construed away in a technical manner so as to frustrate its obvious design. *Sacramento Navigation Co. v. Salz* 273 US 326, 329; *Nevada Half Moon Mining Co. v. Combined Metals Reduction Co.* 176 F. 2d 73, 75 (CA 10 1949), cert. denied 338 US 943.

Contrary arguments which have been made by respondents, to the effect that the words "any effective superseding rate schedules" do not embody consent to an agreed mechanism of change, are without foundation.

(1) In the Memphis brief in opposition to certiorari (p. 15) the argument is made that the "effective superseding rate schedules" provision was agreement only that the contracts are subject to the paramount power of the Commission to modify them in the public interest. It is further suggested that the words are intended to preclude any defense of illegality or impossibility based on the Commission's action (br. 15). These words, however, were not inserted for such limited purposes. The parties knew at the time of their adoption that any and all contracts or rates made after 1938 were necessarily subject to the Commission's express power under § 5(a) of the Act "to determine the just and reasonable rate or . . . contract to be thereafter observed." They knew that § 5(a) had never been used by the Commission to effect a general rate increase but had been used almost exclusively to effect reductions in filed rates. Thus the parties did not adopt these words just to bind a purchaser in the event that a rate reduction should be ordered by the Commission, for this would have been a hollow and unnecessary thing to do. These words, as we have shown, are words of art (pp. 17-18 above). "Words of art bring their art with them",<sup>1</sup> and the words of the pricing clause here were clearly intended to bear a weight and serve a purpose far beyond that suggested by opposing counsel.

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<sup>1</sup>*Some Reflections on the Reading of Statutes*, Sixth Cardozo Lecture before the Association of the Bar of the City of New York March 18 1947 by Felix Frankfurter, 47 Columbia Law Review 527, 537. The speaker continued: "They bear the meaning of their habitat whether it be a phrase of technical significance in the scientific or business world, or whether it be loaded with the recondite connotations of feudalism."

On the other hand counsel goes far to accept our view of the language in saying (br. 15):

"... in effect, it makes Commission action a part of the contract".

That is what we have urged the parties intended to do in adopting the separate and independent rate schedule, together with such action (or inaction) as the Commission might take with respect to new rates initiated by the seller, as the measure of price referred to by the service agreement.

So far as Mississippi Valley is concerned, its counsel acknowledges the obligation to be bound by new rates determined in accordance with the Regulations and the statute, since he says (p. 16 of brief in opposition to certiorari):

"Mississippi has always viewed the language as agreement to pay new rates, if, as and when they became legally effective pursuant to valid exercise of the Commission's regulatory powers, whatever they might be."

In other words, Mississippi Valley as a buyer has always intended to pay rates determined in accordance with the price mechanism above described provided that the Commission's action thereunder is a valid exercise of its powers. This purpose has now been blunted perhaps by the Court of Appeals' misapplication of the decision in the *Mobile* case, but can be fully reinstated by this Court's correction of the error.

(2) It was suggested by Memphis and Mississippi Valley in the court below that the words in question were inserted in the service agreements because all the parties including the Commission were in error as to the seller's powers under the Act, an error illustrated by the Commission's argument in the *Mobile* case and corrected by the decision of this Court therein. Therefore, so it was claimed, up to 1956 the parties must have thought that the phrase

"any effective superseding rate schedules" assumed a statutory power of unilateral amendment exercisable by the seller which this Court held in the *Mobile* case not to exist.

Even if this assumption were correct, the result is that Mississippi Valley when it executed the service agreements intended and consented to flexible rates, variations in which could be initiated by the seller in conformity with the requirements of § 4. The fact that Mississippi Valley agreed to this provision for an incorrect reason—because it thought the statute gave United this power—does not derogate from its consent.

But the assumption upon which this argument is made is erroneous. So far as concerns the service agreements executed by Mississippi Valley on March 25 1955, that respondent, from the oral argument in connection with United's settlement terms in August and September 1954, knew all about the contentions of Mobile Gas Service Corporation (*United Gas Pipe Line Company*, Docket No. G-1142, etc.).<sup>8</sup> At these hearings Mississippi Valley was represented by Messrs. Jerome Ackerman and Edward Burling, and these counsel, who stated that Mississippi Valley recommended the settlement (Tr. 3077, August 17 1954), heard counsel for Mobile Gas Service Corporation urge an exception to the settlement with respect to Mobile's claim and cite the decision in its favor just rendered by the Third Circuit Court of Appeals (Tr. 3132 September 9 1954).

Since Mississippi Valley knew the *Mobile* case had been decided in favor of the buyer before it executed its service agreements with their flexible rate provisions, the interpretation of respondents cannot be founded upon any assumption of a general mistake of law by the contracting parties. Memphis, although a party here, was not a party to the contract negotiations and thus has no light to shed

<sup>8</sup>See FPC Opinion No. 277, App. 751 at 768, filed *sub nom.* *United Gas Pipe Line Co. v. Mississippi River Fuel Corp.* October Term 1957 No. 568, cert. den. 355 US 904.

on the true intention of the parties contracting. In *Dayton Power and Light Co. v. Federal Power Commission* 246 F. 2d 694 (DC Cir. 1957), the District of Columbia Court of Appeals itself held that customers in the position of Memphis were not aggrieved and therefore not entitled to petition for review of a Commission order.

**C. A contrary construction of the executed service agreements would unconstitutionally deprive petitioner of contractual rights.**

Unless the method of price determination agreed to by the parties be sustained, petitioner's right to contract effectively for a price change would be impaired in a manner violative of the Fifth Amendment. Distributors who serve the public generally require long-term contracts as shown by the service agreements here in issue other than the one with Mississippi Valley governing sales for resale for industrial use only (p. 4 above). This resultant pattern of long-term commitments (cf. 350 US at 344) leads to a practical economic necessity for a method of periodic rate change to correspond with changes in costs.

However, despite this pattern, on the one hand the decision of the Court of Appeals holds petitioner disabled to contract for a flexible rate as provided by the terms of its service agreements. On the other hand the Commission has prohibited the inclusion of express rate escalation clauses in service agreements by Reg. 154.38(d)(3). The court's decision thus, whether based on the ground that the statute withholds jurisdiction from the Commission or on any other ground, has arbitrarily deprived petitioner, for purposes not reasonably related to the statute, of its freedom to contract for a just and reasonable rate. *Nebbia v. New York* 291 US 502, 525. Such a deprivation cannot be justified on the ground that it is necessary to carry out the purpose of the Act, for petitioner under the service agree-

ments can alter its original rate only if the new rate is, just and reasonable within the standards of the Act.

A statute should not be so construed as to abrogate common law rights unless clear-cut language therein so requires. *Texas & Pacific Ry. v. Abilene Cotton Oil Co.* 204 US 426, 437; cf. *Federal Power Commission v. Niagara Mohawk Power Corp.* 347 US 239, 252-3. The decision of the Court of Appeals, to the extent that it rests upon a construction of the service agreements themselves, cannot be sustained because it violates the rule that of two possible interpretations of a contract the one which gives it validity is to be preferred. *Great Northern Ry. v. Delmar Co.* 283 US 686, 691 (discrimination in railroad tariff).

### POINT III

**THE SERVICE AGREEMENTS CONFORM TO A WELL-DEFINED TYPE OF CONTRACT IN WHICH PRICE DETERMINATION OR PRICE CHANGE IS EFFECTED PURSUANT TO AN AGREED FORMULA BY REFERENCE TO EXTERNAL STANDARDS.**

As indicated in the foregoing argument, the contracts here involved provided for the initiation of rate change in the exact manner effected by petitioner's September 30 1955 filings. Under the Regulations pursuant to which the executed service agreements were made and within which both seller and buyers operate, the contractual relationship established refers to the rate schedule of a published tariff. A change therein is (a) initiated by the filing by United of a new rate with the notice required by § 4(d), (b) completed by its acceptance (through failure to object, continuing performance, etc.) by members of the class affected and by the Commission, or (c) modified by the process of administrative review (for which specific powers are granted by §§ 4 and 5) with the participation of any affected purchaser who may intervene. The procedure thus utilized is that erected

by the Act itself. And the designation of the publicly posted tariff as the repository of the price determinants accepted by the parties to the service agreements, is in accord with contractual arrangements well known to the business community.

In *Outlet Embroidery Co. v. Derwent Mills* 254 NY 179, Mr. Justice Cardozo, when Chief Judge of the New York Court of Appeals, held that an exchange of letters in which the seller named a price "subject to change pending tariff revision" made an enforceable contract. At the date of the correspondence Congress was debating a new import tariff. Cardozo, J. construed the language according to mercantile standards as meaning that the price specified would have to be augmented by the amount of any tariff increase. He said (pp. 183-4):

"The defendant like the plaintiff supposed that in signing these documents it was doing something understood to be significant and serious. . . . We think there is mere fatuity in a construction of the writing that would turn this reservation into a privilege of arbitrary change, at any time or for any reason, with change of tariff or without."

He said that, if the contract were to be construed as carrying an assent by implication to payment of the price named but augmented by the duty,

"... a known and established standard has fixed the price payable in every possible contingency (*Franklin Sugar Refining Co. v. Lipowicz*, 247 N. Y. 465)".

<sup>9</sup>The case cited enforced memoranda of contract for the sale of sugar in which certain unintelligible notations had to be explained by usage in the sugar trade. In a discussion of contracts which specify no price and require recourse to the market to ascertain their reasonable price, the court cited and followed *Tindal, C. J.*, in enforcing an order to send certain quantities of porter and other malt liquor on "moderate terms". *Tindal, C. J.*, said, "Why is not that sufficient? This is the contract between the parties." 247 NY at 474 citing *Ashcroft v. Morrin*, 4 Mann. & G. 450.

The cases which enforce a contract determining a price by an external standard are numerous:

*Reconstruction Finance Corp. v. United Distillers Products Corp.* 204 F. 2d 511, affirming 113 F. Supp. 468 (CA 2 1952: prices to be fixed by Office of Price Administration pursuant to applicable regulations);

*Pfotzer v. United States* 176 F. 2d 675 (CA 4 1949: sale at stated price subject to increase in accordance with applications on file with Office of Price Administration prior to shipment or to legal price in effect at time of shipment);

*Mancuso v. Krackov* 110 Cal. App. 2d 113, 241 Pac. 2d 1052 (1952: oral contract to provide four carloads of wine in bottled form at maximum price allowed by OPA schedule to be issued in two or three months);

*Ken-Rad Corporation v. R. C. Bohannon, Inc.* 80 F. 2d 256 (CA 6 1935: sale at list prices with reserved right in seller to change list price and discount rate);

*Buggs v. Ford Motor Company* 113 F. 2d 618 (CA 7 1940: motor sales agency involving purchase of cars and accessories at net list prices and published discounts), cert. denied 311 US 688;

*Memphis Furniture Co. v. Wemyss Furniture Co.* 2 F. 2d 428, 432 (CA 6 1924: prices prevailing at time of shipment);

*Keystone Steel & Wire Co. v. Pierce Oil Corp.* 17 F. 2d 476 (CA 7 1927: sale on basis of

posted market prices with increase or decrease by 60% of each increase or decrease in posted market price by five-cent installments);

*Col-Tex Refining Co. v. Coffield & Guthrie, Inc.* 196 F. 2d 788 (CA 5 1952: sale at a price posted by seller based on average posted price of any three of the major companies for like grades in the area);

*Cities Service Gas Producing Co. v. Federal Power Commission* 233 F. 2d 726 (CA 10 1956: sale at prevailing field price at the well-head in designated fields plus reasonable gathering charges, prices to be adjusted from time to time to reflect prevailing field price), cert. denied 352 US 911;

*Ames v. Quimby* 96 US 324 (1877: contract for shovel handles at \$1.25 per dozen on the basis of \$2.25 at present price of gold, sales price to be adjusted if price of gold alters by more than 25%);

See also 1 *Williston on Sales* (1948) § 167.

The reasoning of these decisions is applicable here. In the *Reconstruction Finance Corp.* case, where the contracts provided that the alcohol be paid for at prices to be fixed by the Office of Price Administration under its regulations, the Second Circuit Court of Appeals dealt with the seller's right to administrative review under the OPA practice (204 F. 2d at 511):

"If dissatisfied, the seller could protest to OPA and, if unsuccessful, could appeal to the Emergency Court of Appeals. Pursuant to the contracts provisional payment was to be made by the buyer and, if the OPA

should thereafter revise the maximum price downward, the seller agreed to refund to the buyer excess payments."<sup>10</sup>

In the *Cities Service* case, the Tenth Circuit said in sustaining the enforceability of the price adjustment clause in the contract (233 F. 2d at 729, 730):

"The conclusion is inescapable that the meaning of paragraph 2 is that the prices for the gas were the prices set out in the contract, that such prices would remain until *new prices were established in accordance with the formula set out in the contract*, and that such new prices applied only prospectively.

'Prevailing field price' has a definite and well understood meaning in the oil and gas industry. What is the prevailing field price is a question of fact which can be readily ascertained, and any method which would fairly reflect such price would be a proper yardstick under the contract."<sup>11</sup> (*italics supplied*)

In *Buggs v. Ford Motor Co.*, the Seventh Circuit Court of Appeals thus sustained the validity of a contract for the sale to a dealer of Ford products at "list prices" (113 F. 2d at 620):

"The parties had been dealing with each other prior to the execution of the last contract. They knew of the practices of each other. . . . It was to this known situation that the contract referred. The parties negotiated with a background of past dealings and mutual knowledge of the practices of the trade. 'The net list prices and discounts from published list prices' appearing in paragraph 2 were well known to both parties. These net list prices and pub-

<sup>10</sup>The buyer was defeated for failure to act seasonably under this review procedure.

<sup>11</sup>The attempted change in rate was held unenforceable under the circumstances because the required filing under the Act was not done.

lished list prices *were the same to all dealers*. They changed as necessity required. They were not lacking in definiteness, but *provided a method whereby the prices could be definitely ascertained at any time.*" (italics supplied)

These authorities indicate the rules by which the District of Columbia Court of Appeals should have been guided in interpreting the executed service agreements at bar. They clearly refer to an external standard and invoke therefor the statutory review procedure of the Commission quite as clearly as did the contracts sustained by the Second Circuit Court of Appeals in the *Reconstruction Finance Corp.* case (pp. 44-5, above).

The teaching of this line of cases, we submit, is that an agreement determining price by an external standard (in the case at bar the statutory norms of justness and reasonableness together with the statutory review procedure) contains within itself the consent of the parties as to the price as it may be ascertained in future *pursuant to said standard*. In other words, the agreement to the new price inheres in the method adopted by the parties, and the specific new rate need not be made the subject of a new independent agreement, as the Court of Appeals in the case at bar thought to be necessary (250 F. 2d at 406). In the case at bar too, as in *Buggs v. Ford Motor Company* and other cases, the parties have made their own practical construction of the service agreements (p. 45 above). Finally, just as in the *Cities Service* case (p. 45 above), the terminology in the contracts at bar have a "definite and well understood meaning in the . . . industry" (p. 45 above).

Indeed, the external standard here is more concrete than in many of the cases cited above because the seller cannot arbitrarily change the rate schedule so as to charge any price he wishes for his gas. By the terms of the statute the price which the seller may charge is necessarily re-

stricted. The price must be in the zone of reasonableness. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.* 341 US 246, 251. This means not higher than to provide a fair rate of return and not so low as to be confiscatory. *Federal Power Commission v. Natural Gas Pipeline Co.* 315 US 575, 585-6.

The court below erred, we submit, in treating the assent of the customers of petitioner to a review of petitioner's rate increases under § 4(e) as the appointment of a third party to arbitrate a dispute, with the holding that the Commission has no statutory power to arbitrate (250 F. 2d at 407). The parties did not assume to appoint the Federal Power Commission as arbitrator or to enlarge its existing statutory powers of review. They merely accepted its existing functions under §§ 4 and 5 of the statute as the standard designated by Congress for reviewing price changes initiated by the seller.

The court below erred also in concluding that the parties had not adopted an effective procedure for price change because the three purchasers "are now opposing United's increase before the Commission" (250 F. 2d at 406). The right of opposition is imbedded in the very statutory review procedure adopted by the parties in the general structure of the tariff and service agreements (§ 15[a] of the Act). The Commission by Reg. 154.27 expressly preserved it, as indicated in its 1948 release (p. 20 above). Its exercise is necessary for ascertainment of the just and reasonable rate envisaged by the statute. To say that the preservation of this right to oppose a new posted rate vitiates agreement upon the price mechanism incorporated in the tariff and service agreements, is a *non sequitur* in logic and conflicts with the rule illustrated by such authorities as the *Reconstruction Finance Corp.* case (pp. 44-5 above). The proper logic of the matter, we submit, is that set out in

the holding of Judge Learned Hand in *Brassert v. Clark* 162 F. 2d 967, 971 (CA 2 1947) as follows:

"That dispute did not, however, prevent a contract being made . . . if the parties agreed upon a standard or test, which was at once independent of their mutual consent, and which would determine what patents were to be transferred. The fact that they did not later agree *on the application of the standard* is immaterial." (italics supplied)

Most inconsistent, as it seems to us, with the view taken of the instant service agreements in the court below, is the acceptance by that court of practically identical language for price change in the *Cincinnati* case. This was one of two petitions to review an order of the Federal Power Commission which approved new tariffs of two natural gas companies so as to make a change in the demand-commodity rate form that affected rates. *Cincinnati Gas & Electric Co. v. Federal Power Commission* 246 F. 2d 688 (1957), cert. denied 355 US 930. The *Mobile* case and *Federal Power Commission v. Sierra Pacific Power Co.* 350 US 348 were urged in opposition to the new rate. The District of Columbia Court of Appeals, however, in that instance distinguished those cases with the following language (p. 693):

"These cases are readily distinguishable from this one, for *here the service agreement expressly contemplates future filings* and there has been no unilateral change in rates fixed by contract." (italics supplied)

This would seem to be an implicit endorsement by the court below of the rule of price change which we urge here. However, that court did not notice the *Cincinnati* case (although called to its attention by counsel) in its decision here appealed from.

## POINT IV

**THE COMMISSION'S FINDINGS THAT THE SERVICE AGREEMENTS HEREIN PROVIDED FOR A METHOD OF RATE CHANGE TO WHICH THE BUYERS CONSENTED, ARE CONCLUSIVE.**

The Commission found that by the use of the words "any effective superseding rate schedules, on file with the Federal Power Commission" the parties intended that (1) "changes could properly be made by United in the rates contained in the applicable rate schedules in effect at the time of the execution of the service agreement" and (2) "the purchaser would pay the rates set out in the applicable rate schedules effective from time to time and that changes could be made therein by United under the procedures established under section 4 of the Act" (R. 231).

Questions of contractual intent are questions of fact, as this Court has held in *Henderson Bridge Company v. McGrath* 134 US 260. There, on the issue of whether or not a contract existed, this Court said (p. 275):

"It was for the jury to say whether such contract did in fact exist. It was not for the court to assume and instruct the jury as a matter of law that it did not exist. . . ."

Since therefore the intent of the parties herein is one of fact, the Commission's finding "if supported by substantial evidence, shall be conclusive". Natural Gas Act § 19(b); *Colorado Interstate Gas Co. v. Federal Power Commission* 324 US 581, 589, 595; *Montana-Dakota Utilities Co. v. Federal Power Commission* 169 F. 2d 392, 398 (CA 8 1948), cert. denied 335 US 853. The only evidence in the record below as to the intent of the parties is that these words imported a mechanism for rate change.

The particular words "or any effective superseding rate schedules, on file with the Federal Power Commission" which are contained in the six executed service agreements are also found in United's tariff. They were inserted in both the service agreements and the tariff because Reg. 154.38(d)(3) restricted the right of United to contract for rate changes except by the use of these or words of similar import. As has been pointed out (pp. 8-12 above), the Regulations were designed by the Commission to prevent discrimination in rates and to enforce the scheme of rate regulation intended by Congress under the Act. The powers of the Commission to that end are great, extending even to the determination of what would be a just and reasonable rate, charge or contract in cases where the Commission after hearing has determined an existing contract affecting a rate to be unjust, unreasonable, unduly discriminatory, or preferential (§ 5[a] of the Act). This Court pointed out in the *Mobile* case, 350 US at 341, that § 5(a) and §§ 4(d) and (e) are simply parts of a single statutory scheme, that the basic power of the Commission is given it by § 5(a), and that § 4(e) merely adds to this basic power, in the case of a newly changed rate or contract, further powers to preserve the *status quo* pending review and thereafter to make the order retroactive by means of the refund procedure.

The construction placed upon its own regulations by an administrative agency is entitled to great weight. Thus in *Bowles v. Seminole Rock & Sand Co.* 325 US 410 this Court held that the lower courts committed error in placing a different construction on the Maximum Price Regulation issued by the Administrator of the Office of Price Administration from that of the Administrator. The Court stated (pp. 413-4):

"Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if

the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."

So well understood is this rule that in reliance upon the *Bowles* case the First Circuit Court of Appeals in *Gillarde Co. v. Joseph Martinelli & Co.*, 169 F. 2d 60, reversed its prior decision in 168 F. 2d 276 and held itself bound, contrary to the view of the court itself, by the interpretation which the Department of Agriculture made of its own regulation (p. 61). The point related to the buyer's right to recoup under the Perishable Agricultural Commodities Act. The administrative interpretation having been adhered to for over ten years, said the court (p. 61),

"... it should not be disregarded. Under these circumstances we hold that we should not substitute our interpretation merely because our original thought was that such a drastic interpretation is not needed to carry out the intent of the Act. The Department's interpretation is not plainly erroneous; it is a possible and reasonable interpretation of the regulations, even if not the only possible one."

This Court denied certiorari, 335 US 885.<sup>12</sup>

<sup>12</sup>In *Florida Economic Advisory Council v. Federal Power Commission* 251 F. 2d 643, 651 f.n. 1a (CA DC 1957); cert. denied 356 U. S. 959, one of the judges constituting the panel in the case at bar said in dissenting:

"It may be possible to construe the contracts to mean that any certificate, even a conditional one, would terminate the options to cancel. But the Commission did not so construe them. I do suggest that the Court is not warranted in substituting its construction of the contracts for the construction adopted and acted upon by the Commission." (italics supplied)

For further illustration, the Interstate Commerce Commission has primary jurisdiction under certain circumstances to determine the meaning of words contained in filed tariffs. *Texas & Pacific Ry. v. American Tie & Timber Co.* 234 US 138 (whether "lumber, all kinds" included oak railway cross-ties); *United States v. Western Pacific Railroad Co.* 352 US 59 (whether "incendiary bombs" included steel aerial bomb cases filled with napalm gel but without bursters or fuses). In the latter case Harlan J. reaffirmed the reasons for entrusting such questions to the judgment of administrative agencies, as follows (p. 64):

"In the earlier cases emphasis was laid on the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions. . . . More recently the expert and specialized knowledge of the agencies involved has been particularly stressed. . . ."

Even if the Commission's findings as to the meaning of the words here in dispute are not purely findings of fact as respondents Memphis and Mississippi Valley argued below, nevertheless those findings should here be taken as controlling. In deciding questions of law this Court has recognized the expertness of administrative findings. In *Dobson v. Commissioner of Internal Revenue* 320 US 489, on a question whether a certain payment represented taxable income, this Court held (p. 502):

"In deciding law questions courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter. . . ."

Again, in determining whether a plan was "fair and equitable" within the meaning of § 11(e) of the Public Utility

Holding Act, this Court said in *Securities & Exchange Commission v. Chenery Corp.* 332 US 194, 209:

"The Commission's conclusion here rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts. . . ."

In the instant case the Commission's interpretation of the "effective superseding rate schedules" phrase was consistent with the interpretation that it has placed on these same and similar words appearing in tariffs and executed service agreements of other natural gas companies. In many instances the Commission has approved rate increases of natural gas companies pursuant to language in the respective service agreements substantially similar to the pricing clauses in petitioner's executed service agreements. See e.g. *Ohio Fuel Gas Co.* 10 FPC 145 (1951); *Mississippi River Fuel Corporation* 11 FPC 288 (1952); *Texas Eastern Transmission Corporation* 11 FPC 416 (1952); *United Fuel Gas Co.* 100 PUR NS 405 (1953); *Panhandle Eastern Pipe Line Co.* 3 PUR 3d 396 (1954); *Northern Natural Gas Co.* 9 PUR 3d 8 (1955). In each instance the new rate schedules filed were first suspended and after review certain increases approved. In connection with the United Fuel Gas rate increase see the *Cincinnati Gas* case in the District of Columbia Court of Appeals cited at page 48 above.

Such consistent administrative interpretations must be given great weight. *Norwegian Nitrogen Co. v. United States* 288 US 294, 315; *Bowles v. Seminole Rock & Sand Co.* 325 US 410, 418.

## POINT V

**PROPER ANALYSIS OF THE NATURAL GAS ACT IN THE LIGHT OF THE MOBILE DECISION POINTS TO UTILIZATION OF § 4 TO CONTROL RATE CHANGES AND THUS TO PROVIDE THE FLEXIBLE RATES INTENDED BY THE ACT.**

The Court of Appeals held that, notwithstanding the consent of the customers to "the act of filing", the Commission had *no power* to accept petitioner's new rates for filing under § 4(d) and for review under § 4(e) (250 F. 2d at 406) because the parties had not "negotiated privately a new price term". In so rejecting petitioner's new rate schedules for jurisdictional reasons the Court of Appeals dealt a crippling blow to the system of rate regulation intended by the Act and heretofore enforced by the Commission under its Regulations. It assigned strange roles to the Commission, the natural gas companies and their customers, and destroyed the nice balancing of interest effected by the Regulations which had encouraged the recent extensive growth of the natural gas industry.

Under that decision the Commission is assigned the responsibility for *initiating* and *justifying* rate increases where the natural gas company and its customers cannot agree upon a new rate. Thus the regulatory authority created by statute to review rates instead becomes the proposer of rate increases. The company is denied its basic right to initiate rate change. Such a result is harmful to effective regulation in view of management's intimate knowledge of its own costs and needs for increases and in view of its duty to investors to obtain for them a fair return on their capital.

Finally, the significance of the ruling of the Court of Appeals is that in the absence of an agreed-upon new rate,

a rate increase can become effective only after a § 5(a) hearing has been held by the Commission.

Respondents Memphis and Mississippi Valley ask this court to legitimize this fallacy with the bald assertion (p. 7 of brief in opposition to certiorari):

"And Section 4(d) permits the filing *only* of agreed changes in contract rates." (italics supplied)

The text of the Act can be searched in vain for any such restriction.

(1) *Sections 4 and 5 of the Act.* As previously described (p. 41 above), the method of price change here consented to by the buyers is initiated by the seller filing a new rate schedule under the provisions of § 4(d), with the Commission having the right then to exercise its powers to review. Rate changes initiated in this manner were intended to be governed by what the Court of Appeals recognized as "the more expeditious procedure of Section 4(e)" (250 F. 2d at 406).

This conclusion is apparent from the face of § 4. Under subdivision (d) the "*change*" is made by the company upon 30 days' notice to the Commission. The notice is to be given by filing with the Commission and keeping open for public inspection "new schedules stating plainly the *change* or *changes* to be made in the schedule or schedules then in force". The Commission is given power to "allow *changes* to take effect" without requiring 30 days' notice upon appropriate order. Subdivision (e) provides that, whenever any such new schedule (i.e. specifying the *change* or *changes* to be made in existing schedules) is filed, the Commission may enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service and in the meantime may suspend operation of the new schedule for a period no longer than five months (except as to sale for resale

for industrial use only). If the hearing is not concluded at the end of the suspension period, then the "change of rate" goes into effect. Subdivision (e) also provides that after full hearings the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective, i.e. as if under § 5(a). Provision is also made, when the increased rate or charge becomes effective, for the filing of a bond by the natural gas company to insure such refunds as may be ordered. The burden of proof with respect to the justness and reasonableness of the new rate is placed upon the natural gas company "at any hearing involving a rate or charge sought to be increased".

These provisions of § 4(d) and (e) plainly establish procedure for review of changes in rates, which changes the natural gas company is to initiate. They in no wise inhibit the buyer and seller from adopting such procedure as the medium for modifying from time to time the prices payable under the standing service agreement between them. The legislative history of the Act contains no indication whatever, any more than does the Act itself, that rate changes initiated by the seller must be founded upon a negotiated agreement.

This Court in the historic *Hope* decision recognized that it was § 4 which provided a natural gas company with the method for adjusting rates so as to secure a fair rate of return. Significantly this Court said (320 US at 611):

"The fixing of 'just and reasonable' rates (§ 4) with the powers attendant thereto was the heart of the new regulatory system."

And at p. 615:

"Moreover, if in light of our experience they [adequacy of allowances, etc.] turn out to be inadequate for development of new sources of supply, the doors

of the Commission are open for increased allowances. This is not an order for all time. *The Act contains machinery for obtaining rate adjustments. § 4.*" (italics supplied)

The Regulations promulgated by the Commission in furtherance of its administrative powers to enforce the Act, themselves point to § 4 as the appropriate avenue of rate change (second proviso in Reg. 154.38[d][3] quoted at p. 19 above). For Order 144 as a whole the Commission invoked § 4 together with § 16 as specific authority (13 FR 6372).

In its administration of the Act the Commission has uniformly construed § 4(d) and (e) as the medium of rate change upon the initiative of natural gas companies. Examination of the rate dockets in the Commission indicates that no general rate increase has ever been granted by the Commission otherwise than under § 4. There is no reason to question the Commission's statement in the *El Paso* case<sup>13</sup> that in practical operation the procedure of review of rate changes pursuant to the § 4 process has promoted the "paramount interest of consumers in low reasonable rates for natural gas".

Despite this plain language of § 4 and despite this consistent administrative and judicial construction of its provisions, respondents insist that § 4(d) permits the filing only of agreed changes in contract rates and not rate changes effected pursuant to the provisions contained in the service agreements herein. Respondents thus would excise § 4(d) and (e) from the statute, since almost all wholesale sales of gas are made pursuant to service agreements containing the same or similar provisions. Respondents' reasons for reading § 4(d) and (e) out of the Act are without merit.

<sup>13</sup> *Matter of El Paso Natural Gas Co.* Opinion No. 308, January 24 1958.

The two respondents together with the Municipal Law Officers as *amici*, assert that § 4(e) operates unjustly because, as fast as the Commission rejects a new rate, the natural gas company can file another new rate (br. on certiorari 17; Municipalities br. 5). This argument ignores the fact that the Commission has the power to dismiss a proceeding under § 4(e) involving the new rate where the company has not shown any new or intervening occurrences to warrant reconsideration by the Commission. *Panhandle Eastern Pipe Line Co. v. Federal Power Commission* 236 F. 2d 606 (CA-3 1956).

It is also argued that because the Commission has no power to suspend rate increases or to require refunds in the case of customers who purchase for resale for industrial use only, no rate increase (other than an agreed-upon one) for any type of service should be permitted to become effective under § 4(e). This decision to treat industrial sales differently represents the deliberate choice of Congress. The legislative history reveals that the reason for this Congressional decision was that such sales were usually made under short-term contracts (Congressman Lea's statement in the House of Representatives, 81 Cong. Rec. 6727 July 1 1937). Also the legislative history indicates that Congress felt that there was no reason for such close regulation of these sales because with respect to industrial use there was severe competition with other fuels such as coal, lignite and fuel oil (Hearings before the House Committee on Interstate and Foreign Commerce on HR 5423, 74th Cong., 1st Sess. pp. 1844-5 [1935]; see also pages 1734 and 1743 for reports from industry witnesses concerning fuels in competition with natural gas.) Moreover, a purchaser of gas for resale for industrial use has various ways to protect itself. It can insist upon a short-term contract or obtaining a special fixed-rate contract pursuant to order of the Commission as permitted by Reg. 154.52. It can also procure from its own purchaser an escalation clause adjusting for changes in cost of gas.

In contrast to § 4, § 5(a) of the Act is neither a necessary nor an appropriate part of the machinery for a change of price where a seller is not committed by contract to a fixed price. The very wording of § 5(a) excluded it as the instrumentality for rate increases, not least the proviso stipulating that even after investigation instituted by the Commission there shall be no power to order an increase in a filed rate "unless such increase is *in accordance with a new schedule filed by such natural gas company*". Such new schedule can be filed only under § 4(d).

That § 5(a) was not intended to serve as a vehicle for rate increases is also shown by the fact that it contains no refund provision to permit a *pro tempore* establishment of a new rate, and can operate only prospectively. Thus it cannot afford timely redress to the seller when in a period of rising costs he is deprived of a just and reasonable rate. This defect is made more serious because hearings under § 5(a) are time-consuming<sup>14</sup> and impose a double burden on an already over-burdened Commission which is first obliged to find the existing rate "unjust, unreasonable, unduly discriminatory, or preferential" and then obliged to determine the new just and reasonable rate. Thus in effect the seller is deprived of a just return during the period, however lengthy, needed for administrative determination of his rights. Whereas § 4(e) correctly places the burden upon the natural gas company to justify the rate increase, the burden in a § 5(a) proceeding would be on the Commission. To shift the burden to the Commission is wholly inconsistent with the legislative purpose, which is to protect the consumer.

Despite these inadequacies of § 5(a), as a medium of rate change, the respondents assert and the Court of Appeals held that the seller in the absence of a specific agree-

<sup>14</sup>Recognized as "notoriously long and complicated" by Bazelon J. dissenting in *Oklahoma Natural Gas Co. v. Federal Power Commission* — F. 2d — (CA DC May 28 1958).

ment with the buyer as to a new rate can effect a rate change only under the procedures of § 5(a).

Respondents' principal argument in support of this contention is that this would place rate increases on the same basis as rate reductions (br. on certiorari 26-7); that is, pending a determination by the Commission, no increase or reduction would be effected. While Memphis and Mississippi Valley find this a desirable economic goal, Congress did not. Congress in balancing the various interests involved determined that it was of greater importance to provide a method by which the companies might obtain a fair rate of return in a period of rising costs. Evidently Congress felt that the consumers were adequately protected by giving the Commission power with respect to non-industrial sales to suspend the new rates for five months, to require the natural gas company to post a bond pending Commission determination, and to order refund of whatever amount the Commission deemed proper. Cf. *Hope Natural Gas Co. v. Federal Power Commission*, 196 F. 2d 803, 806-7 (CA 4 1952).

The Court of Appeals advanced no specific reason for its holding that in the absence of an agreed-upon rate a rate change could be accomplished only after a § 5(a) proceeding. Two judges of that court, however, indicated by the insertion of a footnote in the opinion that there was something rather unfair about permitting a seller to effect a rate increase under § 4 (250 F. 2d at 407). Such a result could be reached by that Court only through its radical misunderstanding of the *Mobile* decision.

(2) *The Mobile case.* This Court in its analysis of the Natural Gas Act in relation to the rate-making and rate-changing powers of natural gas companies said that these powers were unaffected by the Act (350 US at 343):

"The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act.

Admittedly the Act presumes a capacity in natural gas companies to make rates and contracts and to change them from time to time, but nowhere in the Act is either power defined."

These words recognize the seller's common law right to contract for a change in rate by reference to an external standard. The *Mobile* case held only that a seller could not invoke § 4 to effect a rate change where he had *contracted away* his right to have the price governed by a flexible rate schedule under which he could obtain a fair rate of return. The seller there had contracted away such right by entering into a bilateral contract which fixed the rate at 10.7 cents per mcf. Under those circumstances this Court held that the seller could seek an increase in such a fixed rate only under § 5(a). This Court said at p. 341:

"The basic power of the Commission is that given it by § 5(a) to set aside and modify any rate or contract which it determines, after hearing, to be 'unjust, unreasonable, unduly discriminatory, or preferential.'"

It recognized that this power could be exercised to abrogate even the ~~fixed~~-rate type of bilateral contract there involved.

That the *Mobile* contract was of such a type is so readily apparent as to need no further discussion (pp. 32-4 above). The language in the *Mobile* case concerning the right of the seller to resort to § 5(a) was directed to the particular facts and contract there in issue, and should be interpreted accordingly. *Cohens v. Virginia* 6 Wheat. 264, 398; *National Mutual Ins. Co. v. Tidewater Transfer Co.* 337 US 582, 604 note 26.

Certainly this Court recognized in *Mobile* that the Commission had the power to review new rates under § 4(e) and to exercise its interim suspension power given by that section (350 US at 342-3). It further expressly recognized

at p. 342 that if the seller has the contractual right to change the rate, nothing in the Act prevents him from so doing:

"If the purported change is one the natural gas company has the power to make, the 'change' is completed upon compliance with the notice requirement and the new rate has the same force as any other rate—it can be set aside only upon being found unlawful by the Commission."

Here it has been demonstrated that under the service agreements, formulated in the matrix of the Regulations, United had the right to have new rates ascertained by reference to the effective rate schedule as it might be on file from time to time with the Commission (pp. 15-29 above).

Thus when United filed its new rate schedules on September 30 1955 the Commission had "jurisdiction" to review the new rates under § 4(e) of the Act, and the Court of Appeals committed palpable error in holding that it did not.

### CONCLUSION

**THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED AND THE ORDER OF THE FEDERAL POWER COMMISSION REINSTATED.**

Respectfully submitted,

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New York, August 1 1958

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AUG 1 1958

JOHN T. FEY, Clerk

IN THE

**Supreme Court of the United States**

OCTOBER TERM, <sup>1958</sup>~~1957~~

No. ~~69123~~

UNITED GAS PIPE LINE COMPANY,  
*Petitioner,*

*vs.*

MEMPHIS LIGHT, GAS AND WATER DIVISION;  
CITY OF MEMPHIS, TENNESSEE; MISSISSIPPI  
VALLEY GAS COMPANY; TEXAS GAS TRANS-  
MISSION COMPANY; SOUTHERN NATURAL  
GAS COMPANY; and FEDERAL POWER COM-  
MISSION,

*Respondents.*

**APPENDIX TO PETITIONER'S BRIEF**

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**Natural Gas Act of 1938, 52 Stat. 821****Rates and charges; schedules; suspension of new rates**

**SEC. 4 (a)** All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in

*Natural Gas Act of 1938, 52 Stat. 821*

force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in

*Natural Gas Act of 1938, 52 Stat. 821*

detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

**Fixing rates and charges; determination of cost of production or transportation**

SEC. 5 (a) Whenever the Commission, after a hearing had upon its own action or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

*Natural Gas Act of 1938, 52 Stat. 821*

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

. . . . .

**Construction, extension, or abandonment of facilities; certificate of convenience and necessity; condemnation proceedings**

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained; after due hearing, and a finding by the Commission that the available supply of natural gas is

*Natural Gas Act of 1938, 52 Stat. 821*

depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

. . . . .

**Hearings: rules of procedure**

SEC. 15 (a) Hearings under this chapter may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

. . . . .

**Administrative powers of Commission; rules, regulations, and orders**

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commissioner shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may

*Natural Gas Act of 1938, 52 Stat. 821*

classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

**Rehearings; court review of orders**

**SEC. 19.** (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall

*Natural Gas Act of 1938, 52 Stat. 821*

forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(c) The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

## Regulations of Federal Power Commission under Natural Gas Act, Part 154, Subdivisions 1-86

### APPLICATION

#### 154.1 Application; obligation to file

On and after December 1, 1948 every natural-gas company shall file with the Commission and post in conformity with the requirements of this part, schedules showing all rates, and charges for any transportation or sale of natural gas subject to the jurisdiction of the Commission and the classifications, practices, rules and regulations affecting such rates, charges and services, together with all contracts in any manner affecting or relating thereto; *Provided, however,* That all such presently effective schedules filed with the Commission before the aforesaid date shall be restated as set forth in § 154.82 to conform with the following rules and regulations, and filed and posted on or before the date specified in § 154.83.

### DEFINITIONS

#### 154.11 Rate schedule

The term "rate schedule" means a statement of a rate or charge for a particular classification of transportation or sale of natural gas subject to the jurisdiction of the Commission, and all terms, conditions, classifications, practices, rules and regulations affecting such rate or charge. This term also includes any contract for which special permission has been obtained in accordance with § 154.52.

#### 154.12 Contract

The term "contract" means any agreement which in any manner affects or relates to rates, charges, classifications, practices, rules, regulations or services for any transportation or sale of natural gas subject to the jurisdiction of the Commission. This term includes an executed service agreement.

*Regulations of Federal Power Commission under Natural Gas Act, Part 154, Subdivisions 1-86*

**154.13 Service agreement**

The term "service agreement" means an unexecuted form of agreement for service under a natural-gas company's tariff.

**154.14 Tariff or FPC gas tariff**

The term "tariff" or "FPC gas tariff" means a compilation, in book form, of all of the effective rate schedules of a particular natural-gas company, and a copy of each form of service agreement.

**154.15 Filing date**

The term "filing date" means the day on which a tariff or part thereof or a contract is received in the office of the Secretary of the Commission for filing in compliance with the requirements of this part.

**154.16 Posting**

The term "posting" means (a) making a copy of a natural-gas company's tariff and contracts available during regular business hours for public inspection in a convenient form and place at the natural-gas company's offices where business is conducted with affected customers and (b) mailing to each customer affected a copy of such tariff or part thereof at the time it is sent to the Commission for filing.

**IN GENERAL**

**154.21 Effective tariff**

The effective tariff of a natural-gas company shall be the tariff filed and posted pursuant to the requirements of this part, and permitted by the Commission to become effective. No natural-gas company shall directly or indirectly, demand, charge or collect any rate or charge for or in connection with

*Regulations of Federal Power Commission under Natural Gas Act, Part 154, Subdivisions 1-86*

the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or impose any classifications, practices, rules or regulations, different from those prescribed in its effective tariff and executed service agreements on file with the Commission, unless otherwise specifically provided by order of the Commission.

**154.22 Notice requirements**

All tariffs, and contracts or any parts thereof shall be filed with the Commission and posted not less than thirty days nor more than sixty days prior to the proposed effective date thereof, unless a different period of time is permitted by the Commission in accordance with § 154.51: *Provided, however,* That no natural-gas company shall file under this part any new rate schedule or contract for the performance of any service for which a certificate of public convenience and necessity must be obtained pursuant to section 7 (c) of the Natural Gas Act, until such certificate has been issued. Nothing herein shall be construed as preventing the natural-gas company from entering into any such agreement prior to the granting of such a certificate.

**154.23 Acceptance for filing not approval**

The acceptance for filing of any tariff, contract or part thereof is not to be considered as approval by the Commission.

**154.24 Rejection of material submitted for filing**

The Commission reserves the right to reject any material submitted for filing which fails to comply with the requirements set forth in this part.

**154.25. Informal submission for staff suggestions**

Any natural-gas company may informally submit a tariff or any part thereof or material relating thereto for the suggestions of the staff of the Commission prior to filing.

*Regulations of Federal Power Commission, under Natural Gas Act, Part 154, Subdivisions 1-86*

**154.26 Number of copies to be supplied**

Two copies of any tariff, contract, or part thereof, and material relating thereto, Certificates of Adoption, and Notices of Cancellation or Termination submitted for filing must be supplied to the Commission: *Provided, however,* That restatements filed pursuant to §§ 154.81 through 154.86 shall be furnished in quintuplicate. All copies are to be included in one package, together with a letter of transmittal and other material and information required by these rules, and addressed to the Federal Power Commission, Washington 25, D. C. The Commission reserves the right to request additional copies.

**154.27 Comments by interested parties**

Comments of any purchaser or other interested party concerning any filing made pursuant to this part should be submitted within 15 days after the date of filing. This section shall not limit any right to file protests and complaints.

**FORM AND COMPOSITION OF TARIFF**

**154.31 Application**

Sections 154.32 through 154.41 after December 1, 1948 are applicable to all rate schedules thereafter filed or restated, except that such sections are only partially applicable to rate schedules filed under § 154.52. (A form of an assembled tariff is available upon request.)

**154.32 Form, type, and size**

The tariffs shall be printed, typewritten or otherwise reproduced on 8½ by 11 inch sheets of a durable paper so as to result in a clear and permanent record. The sheets of the tariff shall be ruled to set off borders of 1¼ inches on top, bottom and left sides and ½ inch on the right side, punched on the left side and assembled in a binder.

*Regulations of Federal Power Commission under Natural Gas Act, Part 154, Subdivisions 1-86*

**154.33 Binder, title page and arrangements**

(a) The binder shall show on the front cover:

**FPC Gas Tariff**  
**Original Volume No. 1**

**of**

**(Name of Natural-Gas Company)**

**Filed with**

**Federal Power Commission**

If it is advisable to submit the tariff in two or more volumes, the volumes shall be identified by "Original Volume No. 1", "Original Volume No. 2", etc., directly below the words "FPC Gas Tariff." Rate schedules for which special exception has been obtained under § 154.52 may be filed in a separate volume as part of the tariff.

(b) When any volume of a tariff is to be superseded or replaced in its entirety, the replacing volume shall show prominently on the binder and the title page the volume number being superseded or replaced, as for example:

**FPC Gas Tariff**

**First Revised Volume No. 1**

**(Supersedes Original Volume No. 1)**

(c) The first page shall be a title page which shall carry the information shown on the cover and, in addition, the name, title, and address of the person to whom communications concerning the tariff should be sent.

(d) All sheets except the title page shall have the following information placed in the margins:

(1) *Identification.* At the left above the top marginal ruling, the exact name of the company shall be shown, under which shall be set forth the words "FPC Gas Tariff," together with volume identification where applicable.

*Regulations of Federal Power Commission under Natural Gas Act, Part 154, Subdivisions 1-86*

(2) *Numbering of sheets.* At the right above the top marginal ruling, the sheet number shall appear after the words "Original Sheet No. ...." All sheets in the originally filed tariff shall be numbered consecutively beginning with the table of contents as "Original Sheet No. 1."

(i) Revised or superseding sheets shall be numbered "..... Revised Sheet No. ...." below which shall appear "Superseding ..... Sheet No. ...." The first blank above shall show the number of the revision (i.e., First, Second, etc.) and the sheet number shall be the same as the sheet replaced. The third and fourth blanks shall be filled according to the numbering of the sheet replaced.

(ii) Sheets which are to be inserted between two consecutively numbered sheets shall be designated "Original Sheet No. ....," with the blank space filled with the appropriate number and a letter to indicate an insertion. Illustration: Three sheets would come between original sheets 8 and 9 would be designated "Original Sheet No. 8A," "Original Sheet No. 8B," and "Original Sheet No. 8C."

(3) *Issuing officer and issue date.* On the left below the lower marginal ruling, shall be placed "Issued by:" followed by the name and title of the person authorized to issue the sheet. Immediately below shall be placed "Issued on" followed by the date of issue.

(4) *Effective date.* On the right below the lower marginal ruling shall be placed "Effective:" followed by the specific effective date desired by the Company.

(5) *Sheets filed to comply with Commission orders.* Sheets which are filed to make effective rate schedules or provisions ordered by the Commission shall carry the following notation in the bottom margin: "Issued to comply with order of the Federal Power Commission, Docket No. ...., dated ....."

***Regulations of Federal Power Commission under Natural Gas Act, Part 154, Subdivisions 1-86***

**154.34 Composition of tariff**

(a) The tariff shall contain, in the order named, sections setting forth a table of contents, a preliminary statement, a map of the system, the rate schedules, general terms and conditions, form of service agreement and an index of purchasers: *Provided, however,* That rate schedules for which special exception has been obtained under § 154.52 may be filed in a separate volume as permitted by § 154.33.

(b) Rate schedules shall be grouped according to class and numbered serially within each group, using a letter before the serial number to indicate the class of service. For example, G-1, G-2 may be used for general service; CD-1, CD-2 for contract demand service; I-1, I-2 for interruptible service; T-1, T-2 for transmission service; X-1, X-2 for schedules for which special exception has been obtained.

**154.35 Table of contents**

The table of contents shall contain a list of the rate schedules and other sections in the order in which they appear, showing the sheet number of the first page of each section. The list of rate schedules shall consist of (a) the symbol designation of each rate schedule, (b) a very brief description of the service, and (c) the sheet number of the first page of each rate schedule.

**154.36 Preliminary statement**

The preliminary statement shall contain a brief general description of the company's operations and may also contain a general explanation of its policies and practices. No general rules and regulations shall be included in the preliminary statement, nor any material necessary for the interpretation or application of the rate schedules.

***Regulations of Federal Power Commission under Natural Gas Act, Part 154, Subdivisions 1-86***

**154.37 Map**

The map shall show on a single sheet, if practicable, the general geographic location of the company's principal pipe line facilities and of the points at which service is rendered under the tariff. Where the company's rate schedules are generally available by area, the boundary lines of the rate zones or rate areas should be shown and the areas or zones identified. The map shall be revised annually to reflect major changes if any.

**154.38 Composition of rate schedule.**

The sheets of a rate schedule shall contain a statement of a rate or charge and all terms and conditions governing its application, arranged as follows:

(a) *Title.* Each rate schedule shall have a title consisting of a designation (see § 154.34), and a statement of the type or classification of service to which it is applicable.

(b) *Availability.* This paragraph shall describe the conditions under which the rate is available, and, if necessary, the geographic zone in which available.

(c) *Applicability and character of service.* This paragraph shall fully describe the kind or classification of service to be rendered.

(d) *Statement of rate.* (1) Except as permitted in §§ 154.52 and 154.82, all rates shall be clearly stated in cents or in dollars and cents per unit. Only the rates and charges to be used in current billing shall be included in the rate schedules.

(2) A rate having more than one part shall have each part set out separately under appropriate headings such as: Demand Charge, Commodity Charge, etc. The mini-

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imum bill and other provisions affecting charges shall not be included in this paragraph, but shall be included in subsequent paragraphs.

(3) No rule, regulation, exception or condition, such as tax, commodity price index, wholesale price index, purchased gas cost adjustment clauses or other similar price adjustments or periodic changes shall be included in the rate schedule or any other part of the tariff which in any way purports to effect the modification or change of any rate or charge specified in the rate schedule, or the substitution therefor of any other rate or charge: *Provided, however*, a natural-gas company may state in the service agreement or in rate schedules filed pursuant to § 154.52 that it is or will be its privileges under certain specified conditions, to propose to the Commission a modification, change or substitution of the then effective rate or charge: *Provided further*, That no such clause may effectuate a change in an effective rate or charge except in the manner provided in section 4 of the Natural Gas Act, as amended, and the regulations in this part.

(e) *Minimum bill.* The minimum bill heading shall appear on every rate schedule followed by the word "none" if no minimum bill is provided.

(f) *Other provisions.* All other major provisions governing the application of the rate schedule, such as determination of billing demand, contract demand, heat content, measurement base, shall be set forth similarly with appropriate headings, or if appropriate, they may be incorporated by reference to the applicable general terms and conditions.

(g) *Applicable general terms and conditions.* This paragraph shall list by reference the general terms and conditions set forth in the following section which apply to the particular rate schedule.

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**154.39 General terms and conditions**

This section shall contain provisions which apply to all or any of the rate schedules and which may more conveniently be arranged in a separate section of the tariff. Subsections and paragraphs shall be numbered for convenient reference.

**154.40 Composition of service agreement**

There shall be submitted as part of the tariff an unexecuted copy of each form of service agreement. The service agreement forms should provide for insertion of such items as the name of the purchaser, service to be rendered, area to be served, maximum obligation to deliver, delivery points, delivery pressure, applicable rate schedules by reference to the tariff, effective date and term, and identification of any prior agreements being superseded.

**154.41 Index of purchasers**

(a) The index of purchasers shall contain an alphabetical list of all purchasers under the tariff, showing for each the rate schedule or schedules under which service is rendered, and the following information concerning the contract: (1) the date of execution, (2) the effective date and (3) the term.

(b) The index of purchasers shall be kept current by filing new or revised sheets within 60 days of any change.

**SPECIAL PERMISSIONS**

**154.51 Waiver of notice requirements**

Upon application and for good cause shown, the Commission may by order provide that a tariff, contract, or part thereof shall be effective on less than 30 days notice. The Commission, upon request and for good cause shown, may

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permit a tariff, contract, or part thereof to be filed prior to sixty days before the proposed effective date.

**154.52 Exception to form and composition of tariff**

(a) Upon application and for good cause shown, the Commission may permit special rate schedules to be filed in the form of an agreement in the case of special operating arrangements such as for exchange or transportation of natural gas; or for the sale of gas at charges computed on a cost-formula basis, which charges need not be stated in cents or in dollars and cents per unit. Such rate schedules shall conform to the form, type and size specified in § 154.32 and shall contain on each sheet the marginal notation specified in § 154.33. In addition each such rate schedule shall contain a title page which shall show its designation, the parties to the agreement, the date of agreement and a brief generalized description of services to be rendered. Such rate schedules shall not contain any supplements. Any modifications shall be by revised or insert sheets.

(b) Such rate schedules may be included in a separate volume of the tariff, which shall contain a table of its contents. This table of contents shall also be incorporated with the table of contents of other volumes.

**METHOD OF SUBMISSION FOR FILING**

**154.61 Application**

Sections 154.62 through 154.65, except as otherwise specifically provided in this part, apply to all tariffs, executed service agreements, or parts thereof which are filed after December 1, 1948.

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**154.62 Material submitted with initial rate schedule or executed service agreement**

(a) With the filing of any initial rate schedule or executed service agreement not superseding or making any change in a rate schedule, executed service agreement, or part thereof already on file, there shall be included a letter of transmittal containing a list of the material inclosed, the date on which such filing is proposed to become effective, and a list of the purchasers to whom it has been mailed: *Provided, however,* That the provisions of this section shall not be applicable to filings made pursuant to §§ 154.81 through 154.86.

(b) In addition, the following material shall be submitted when applicable:

(1) *Statement of the reasons for initial rate schedule.* A statement of the nature, and the reason for such proposed initial rate schedule. Data submitted in response to subsequent items may be included by reference as a part of the response to this item.

(2) *Estimate of sales and revenues under an initial rate schedule or executed service agreement.* An estimate of sales or transportation performed and revenues thereunder, by months, for the 12 months immediately succeeding the proposed effective date. The estimate shall be subdivided by rate schedules, classes of service, customers and delivery points, when more than one is involved. Such data shall include estimates of actual and billing quantities, that are to be used to compute the charges, such as actual demands, billing demands, volumes, heat content, and other determinants.

(3) *Basis of the rate or charge proposed in initial rate schedule.* A statement shall be submitted explaining

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the basis used in arriving at the proposed rate or charge. Such statement shall clearly show whether such rate or charge results from negotiation, cost of service determination, competitive factors, or others, and shall give the nature of any studies which have been made in connection therewith. If all or any portion of such information has already been submitted to the Commission, specific reference thereto should be made.

**154.63 Material submitted with changes in a tariff, executed service agreement or part thereof**

(a) With the filing of any tariff, executed service agreement or part thereof which changes or supersedes any tariff, contract or part thereof on file with the Commission, there shall be included a letter of transmittal containing a list of the material enclosed, the date on which such filing is proposed to become effective, and a list of the purchasers to whom it has been mailed: *Provided, however,* That the provisions of this section shall not be applicable to filings made pursuant to §§ 154.81 through 154.86, unless such filing results in a change in rate, charge, classification or service.

(b) In addition, the following material is to be submitted where applicable:

(1) *Statement of reasons for change in tariff, contract, or part thereof.* A statement of the nature, the reasons and the basis for the proposed change. Data submitted in response to subsequent items may be included by reference as part of the response to this item.

(2) *Comparison of sales and revenues if change in rate or charge involved.* A comparative statement of sales made or transportation performed and revenues therefrom, by months, under the present and proposed tariff,

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contract, or part thereof, each applied to the transactions for the twelve months immediately preceding and for the twelve months immediately succeeding the proposed effective date of the change in tariff, contract or part thereof. Actual data shall be used as far as possible, and any estimated data should be designated as such. The statement shall be subdivided by rate schedules, classes of service, customers, and delivery points when more than one is involved. Such data shall include actual and billing quantities that are used to compute the charges, such as actual demands, billing demands, volumes, heat content and other determinants.

(3) *Rate increase filings*—(i) *Rate increases.* (a) If the proposed change in tariff or rate schedule will result in a major increase in rates or charges, there shall be submitted Statements A to M, inclusive, described hereafter: *Provided, however,* That Class B, C and D companies, as defined in the Uniform System of Accounts for natural gas companies, need file only Statements L, M and N. Proposed increases are major when (1) the changes relate to a general increase in revenues for the purpose of obtaining a fair return on the jurisdictional sales, (2) where they extend to all, or substantially all, of the jurisdictional sales, or (3) where an increase in rates is associated with the delivery of substantially increased volumes of gas to existing customers: *Provided, however,* That a natural gas company filing another major increase in rates or charges within a period of twelve months after the filing of Statements A through M, or the end of the test period used therein including the period of adjustments shown on Statements A through M, may submit for such other increase Statements L, M, and N in lieu of Statements A through M if:

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**(i) The proposed new rate increase is filed to compensate only for an increase in the cost of purchased gas; and**

**(ii) There has been no material change in the natural gas company's facilities, sales volumes, and cost of service other than cost of purchased gas since such prior rate increase was filed.**

**[Subparagraph (a) amended by Order 185, 21 F. R. 1485, Mar. 8, 1956]**

**(b) If minor increases are proposed, then Statements L, M and N shall be filed. Minor changes are those which are not designed to provide general revenue increases, such as to offset increased costs or otherwise achieve a fair return on the over-all jurisdictional business. Minor changes usually relate to a few schedules and are designed to bring such schedules into harmony with general tariff policy, to eliminate inequities and to achieve other formal adjustments, in cases where any increase in revenue is subordinate to some other purpose. For the purpose of compliance with these rules, proposed increases in rates or charges which, for the test period, do not exceed the smaller of \$100,000, or 5 percent, of the revenues under the jurisdiction of the Commission shall be considered minor.**

**(c) If the natural gas company has relied on data other than those in Statements A through N in support of its rate increase, such other data, appropriately identified and designated as such and separately stated, shall be submitted with the data required by Statements A to N but limited to the test period referred to below. Ten sets of the statements and of the additional information, if any, shall be submitted, each set securely bound in a cover.**

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[Subparagraph (c) amended by Order 185, 21 F. R. 1485, Mar. 8, 1956]

(d) Where the data submitted in Statements A to N do not comply with the requirements of the rules, the rate filing is subject to rejection: *Provided, however, That*, if the proposed rate increase is filed at least 45 days before the effective date proposed therefor and such filing does not comply with the requirements of the rules, the natural gas company will be notified of the deficiencies, and if such deficiencies are properly cured within 10 days from the date of such notice, the requisite supplementary material will be deemed to have been filed as of the same date as the initial submittal of the proposed rate increase.

[Subparagraph (d) amended by Order 185, 21 F. R. 1485, Mar. 8, 1956]

(e) Test period: (1) If the natural gas company has been in operation for 12 months at the time of the filing, the Statements A to K, inclusive, or N, as appropriate, shall be based upon a test period consisting of 12 consecutive months of most recently available actual experience, adjusted for changes in revenues and costs which are known and are measurable with reasonable accuracy at the time of the filing, and which will become effective within eight months of the last month of available actual experience: *Provided, however, That*, for good cause shown, upon application of the natural gas company made to the Commission 30 days in advance of the rate filing, the Commission may allow reasonable deviation from the prescribed test period. The 12 months of experience shall be adjusted to eliminate nonrecurring items, but this shall not preclude the replacement of the nonrecurring item with another item of nonrecurring nature which the natural gas company anticipates will be realized, including the provision for the normalizing of such items as rate case expenses. If the natural gas company has had less

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than 12 months' experience, the test period may consist of 12 consecutive months ending not more than one year from filing date.

[Subparagraph (1) amended by Order 185, 21 F. R. 1485, Mar. 8, 1956]

(2) Adjustments to experience, or estimates where 12 months' experience is not available, may include the amounts for facilities for which a permanent or temporary certificate is outstanding, provided such facilities will be in service within the test period, but shall not include any amounts for facilities in respect to which a certificate of public convenience and necessity must be obtained but which has not been issued at the date of filing, nor shall adjustments or estimates include any amounts for other facilities associated therewith. The bases and procedures, including significant data, used in the derivation of adjustments or estimates shall be submitted in sufficient detail on supporting statements as to permit ready analysis of such adjustments or estimates.

(f) Joint facilities: If the natural gas company operates other departments in addition to the natural gas operations involved in the subject rate increase and has allocated to such natural-gas operations any of its investment in joint or other department facilities and the operating, maintenance, or depreciation costs associated therewith, it shall show on the following statements, or the schedules in support thereof, the amounts so allocated together with the methods used in making such allocations: *Provided*, That if such allocations are recorded in the natural gas company's books on the basis of current accounting procedures the submittal may be confined to a brief description of the methods followed.

***Statement A—Over-all cost of service.*** This statement shall summarize the over-all gas utility cost of service

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(operating expenses, depreciation, taxes and return) developed from the supporting statements described below.

**Statement B—Rate base and return.** This statement shall summarize the over-all gas utility rate base from the figures contained in Statements C, D, and E, with an appropriate deduction for Contributions in Aid of Construction, if any. The statement shall also include the claimed rate of return and shall show the application of the claimed rate of return to the over-all rate base.

**Statement C—Cost of plant.** This statement shall show in summary form the amounts of gas utility plant classified by Accounts 100.1, 100.2, 100.3, 100.4, 100.5 and 100.6 as of the beginning of the 12 months of actual experience, the book additions and reductions during such 12 months together with the balances at the end of such 12 months. In adjoining columns there shall be shown the adjustments, if any, to the book balances and the total cost of the plant.

A supporting schedule in similar columnar form shall be submitted showing for each of the above accounts the amounts by detailed plant accounts as prescribed by the Commission's Uniform System of Accounts for Natural Gas Companies (§§ 201.301 to 201.392 of Subchapter F of this chapter) with subtotals thereof by functional classifications, i. e., Intangible Plant, Manufactured Gas Production Plant, Natural Gas Production Plant, Products Extracting Plant, Underground Storage Plant, Local Storage Plant, Transmission Plant City Gate and Main Line Industrial Measuring and Regulating Station Plant, General Distribution System Plant, and General Plant: *Provided, however,* That to the extent plant costs are not available by detailed plant accounts they may be shown by functional classifications. All adjustments shall be fully and clearly explained.

The supporting schedule for Account 100.1 shall include appropriate adjustments to exclude major items of plant which are expected to be retired from service during the period.

The supporting schedule for Account 100.3 shall include adjustments to exclude such plant as in process of construction which is not expected to be placed in service by the end of the test period.

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The major plant additions and retirements, together with associated costs, for the test period shall be described and the approximate dates of commercial operation or retirement from service shall be given.

\* *Statement D—Accrued depreciation, depletion and amortization.* This statement shall show the depreciation, depletion and amortization reserves by functional classifications of gas utility plant as of the beginning of the 12 months of actual experience, the book additions and reductions during such 12 months, together with the balances at the end of such 12 months. In adjoining columns there shall be shown the adjustments, if any, to the book figures and the total. Such adjustments shall be clearly and fully explained. If it is necessary to allocate an over-all gas plant reserve by functions, a complete explanation of the method, procedures and significant data used in making the allocation shall be set forth.

*Statement E—Working capital.* This statement shall show the computation of the working capital claimed as a part of the gas utility rate base. The statement shall show the respective components of the claimed working capital and be in such detail as to show how the amount of each component was computed. The balances for Materials and Supplies and Prepayments for gas utility operations shall be shown at the beginning and at the end of each of the 12 months of actual experience.

If the cost of natural gas in storage is claimed as a part of the rate base, a separate supporting schedule shall be submitted showing the quantities and the respective costs of natural gas stored at the beginning of the test period, the input and output in Mcf and associated costs by months, and the balance at the end of the 12 months of actual experience.

Any necessary adjustments shall be shown in columns adjoining the amounts reported in the books. Such adjustments shall be clearly and fully explained.

*Statement F—Rate of return—(1) Rate of return claimed.* This statement shall show the percentage rate of

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return claimed and the general reasons therefor. In addition, the following information shall be submitted:<sup>1</sup>

(2) *Debt capital.* (i) Show for each class and series of long-term debt outstanding according to the balance sheet as of the end of the 12-months actual experience:

(a) Title.

(b) Date of issuance and date of maturity.

(c) Interest rate.

(d) Principal amount of issue:

Gross proceeds.

Underwriters discount or commission:

Amount.

Percent gross proceeds.

Issuance expense:

Amount.

Percent gross proceeds.

Net proceeds.

Net proceeds per unit.

(e) Cost of money:

Yield of maturity based on the interest rate and net proceeds per unit outstanding determined by reference to any generally accepted table of bond yields.

(f) If issue is owned by an affiliate, state name and relationship of owner.

(ii) Show weighted average cost of debt capital as determined from the foregoing detail.

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<sup>1</sup>Where a substantial portion of the common stock of the natural gas company is not held by the public but is owned by another corporation, whose principal business is the holding of the securities of gas utilities, the information required by this section in respect of debt capital and preferred stock capital shall be submitted to the extent applicable, and in addition the data described shall be submitted with respect to the debt, preferred stock and common stock of the parent company.

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**(3) Preferred stock capital.** (i) Show for each class and series of preferred stock outstanding according to the balance sheet as of the end of the 12-months actual experience:

**(a) Title.**

**(b) Date of issuance.**

**(c) If callable, call price.**

**(d) If convertible, terms of conversion.**

**(e) Dividend rate.**

**(f) Par or stated amount of issue:**

Gross proceeds.

Underwriters' discount or commission:

Amount.

Percent gross proceeds.

Issuance expenses:

Amount.

Percent gross proceeds.

Net proceeds.

Net proceeds per unit.

**(g) Cost of money:**

Dividend rate divided by net proceeds per unit.

**(h) Whether issue was offered to stockholders through subscription rights or to the public.**

**(i) If issue is owned by an affiliate, state name and relationship of owner.**

**(ii) Show weighted average cost of outstanding preferred stock capital as determined by detail submitted under Subpart (2) (i) above.**

**(4) Common stock capital.** (i) Show for each sale of common stock during the five-year period preceding the balance sheet as of the end of the 12-months actual experience:

**(a) Number of shares sold.**

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**(b) (1) Gross proceeds at offering price.**

**(2) Underwriters' discount or commission:**

**Amount.**

**Percent gross proceeds.**

**(3) Proceeds to applicant.**

**(4) Issuance expenses:**

**Amount.**

**Percent gross proceeds.**

**(5) Net proceeds:**

**Offering price per share.**

**Net proceeds per share.**

**(c) Book value per share at date immediately prior to issuance:**

**Closing market price at latest trading date prior to date of issuance.**

**Latest published earnings per share available at date of issuance.**

**Dividend rate at date of issuance.**

**(d) Whether issue was offered to stockholders through subscription rights or to the public.**

**(ii) Submit information respecting any stock dividends, stock splits or changes in par or stated value during five-year period preceding date of the balance sheet and by months for the twelve-month period ended that date.**

**(iii) Submit following information on outstanding common stock for the five calendar years preceding the date of the balance sheet and by months for the twelve-month period ended that date:**

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	Average number of shares out- stand- ing <sup>1</sup>	Book value (per share) <sup>1</sup>	Annual earn- ings (per share) <sup>2</sup>	Annual divi- dend (rate per share)	Divi- dends (per- cent earn- ings)	Average market price, basis monthly, high-low ratio) <sup>3</sup>	Earn- ings (price ratio) <sup>3</sup>	Divi- dend (price ratio) <sup>4</sup>
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**Years:**

- 1.....
- 2.....
- 3.....
- 4.....

**Months:**

- 1.....
- 2.....
- 3.....
- 4.....
- 5.....
- 6.....
- 7.....
- 8.....
- 9.....
- 10.....
- 11.....
- 12.....

<sup>1</sup>This information need not be submitted by months.

<sup>2</sup>For monthly figures, show latest reported twelve-month average.

<sup>3</sup>Relationship of annual earnings per share to average of the 12 monthly high-low market values of stock. In the case of monthly data use latest reported earnings in computing ratio of earnings to average high-low market value for month.

<sup>4</sup>Relationship of dividend per share to average high-low market value of stock.

(iv) If the applicant relied upon ratios or other data concerning the common stocks of other specific companies in reaching its conclusion as to a fair allowance for earnings on

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common equity, submit the following information to the extent available from published sources respecting the common stock of such other companies:

- (a) With respect to recent issuances, the same information as submitted under (3) (i).
- (b) With respect to outstanding issues, the same information as submitted under (3) (iii).
- (v) Show the earnings per share of common stock which the claimed rate of return would yield.

**Statement G—Gas operating revenues and sales volumes.** This statement shall show the revenues from gas sales, other gas-operating revenues, and sales volumes classified as between jurisdictional and non-jurisdictional sales and services as follows:

(a) Revenues by months and the totals thereof for the 12 months of actual experience from jurisdictional sales as computed under the presently effective and proposed rates together with the differences in the annual revenues, and the actual annual revenues from the non-jurisdictional sales.

(b) Revenues by months and the totals thereof for 12 months of actual experience as adjusted for changes which are known and measurable and which are expected to be realized within 8 months of the last month of available actual experience from jurisdictional sales as computed under the presently effective and proposed rates, together with the differences in the annual revenues for the test period, and the annual revenues from the non-jurisdictional sales under the rates effective during the test period.

Each jurisdictional sale for resale, and each jurisdictional transportation service, shall be shown separately but the main line non-jurisdictional sales and non-jurisdictional field sales may be separately grouped and the other sales may also be grouped by the classifications prescribed by the Commission's Uniform System of Accounts for Natural Gas Companies. For each revenue item shown separately, there shall

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be shown the points of delivery, the billing quantities for each month and their determinants or adjustments (demands, volumes, Btu content, Btu adjustment, etc.), and the maximum single day's delivery in each month if available. In the event any sale shown separately is made through more than one delivery point, and conjunctive billing is provided by the tariff, the above data may be combined for all delivery points.

This Statement G shall be included, in full, in the submittal to the Commission and to all State commissions having jurisdiction over the affected customers of the natural-gas company. The submittal to each of the affected customers may be limited to exclude the above details by months except with respect to the gas sales to, or transportation service for, that particular customer, provided a copy of Statement G, in full, is promptly submitted to any affected customer upon such customer's request.

The data supplied in this statement shall be in lieu of the data called for by section 154.63 (b) (2).

[Statement G amended by Order 185, 21 F. R. 1485, Mar. 8, 1956]

**Statement H—Revenue deductions—**(1) **Operating expenses.** This statement shall show the gas operating expenses according to each account of the Uniform System of Accounts for Natural Gas Companies. The operating expenses shall be shown under appropriate columnar headings, as follows, with sub-totals for each functional classification: (a) Actual operating expenses by months for the 12 months of actual experience, and the total thereof, (b) adjustments, if any, to such total actual operating expenses, and (c) total adjusted operating expenses for the test period. Detailed explanations of the adjustments, if any, and the manner of their determination shall be supplied, specifying the month or months during which the adjustments would be applicable.

On a separate supporting schedule, the total annual cost of gas purchased for the most recent 12 months of actual experience, the adjustments thereto for the test period, and the total adjusted cost shall be detailed for each purchase source of supply, provided, however, that with respect to field and gasoline outlet purchases, as designated in the Uniform System of Accounts for Natural Gas Companies,

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the data, except that relating to purchases from affiliates, may be grouped by fields and prices. The schedule shall also show the volumes in Mcf. pressure base, and the components of the purchase gas costs as between demand costs, commodity costs, etc. Field purchases of 100,000 Mcf or less annually from individual vendors may be grouped by field or production areas.

*(2) Depreciation, depletion, and amortization expense.*

This statement shall show the gas plant depreciation, depletion, and amortization expense by functional classifications for the test period. These expenses shall be shown in separate columns, as follows: (a) Expenses for the 12 months of actual experience, (b) adjustments, if any, to such expense, and (c) the total adjusted expense for the test period. All adjustments shall be fully and clearly explained. The amounts of depreciable plant shall be shown by the functions specified in Account 503.1, Depreciation of the Commission's Uniform System of Accounts for Natural Gas Companies, and, if available, for each detailed plant account, together with the rates used in computing such expenses. Any deviation from the rates used in the applicant's last annual report on file with the Commission shall be explained showing the rate or rates previously used together with supporting data for the new rate or rates used for this statement.

*(3) Income taxes.* This statement shall show the estimated income taxes and the computation thereof separately as between Federal and State, for the test period, based on the claimed return applied to the overall gas utility base. If the natural gas company has income from other departments, there shall be shown the total estimated corporate income tax for the test period and the methods employed in allocating such total tax to the several departments. If the natural gas company joins in a consolidated tax return, there shall be given the total estimated tax savings expressed as a percentage, resulting from the filing of the consolidated return, as well as a full explanation of the method of computing the tax saving for the natural gas company and its natural gas utility department.

Any abnormalities (such as non-recurring income, losses, deductions, etc.) affecting the income tax for the test period shall be explained and the tax effect thereon set forth.

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(4) *Other taxes.* This statement shall show the gas utility taxes, other than Federal or State income taxes, applicable to the test period. These taxes shall be shown in separate columns, as follows: (a) Tax expense per books for the 12 months of actual experience, (b) adjustments, if any, to such taxes, and (c) the total adjusted taxes for the test period. The taxes shall be shown by states and by kind of taxes. All adjustments shall be fully and clearly explained.

*Statement I—Allocation of over-all cost of service.* This statement shall show the allocation of the over-all cost of service (Statement A), between the jurisdictional and the non-jurisdictional sales and services. The statement shall show the allocation of the operating expenses (by functional classifications), depreciation, depletion and amortization expenses, income taxes, other taxes and return, and for each such cost of service item the statement shall show the allocation ratio or ratios used, including the derivation of such ratios. The methods and the procedures used in allocating the costs shall be set forth in such detail as to readily disclose the principles and steps followed. Where a demand factor is used in allocating costs, full details of the classification of costs to that factor and of the bases of allocation, such as respective loads during peak period, etc., shall be given. The deliveries to jurisdictional and non-jurisdictional customers on the three continuous days of Maximum transmission system deliveries during October, November, December, January, February, and March within the 12 months of actual experience shall be shown and classified as between firm, interruptible, exchange, emergency, etc., gas deliveries. In addition, there shall be shown the estimated three-day corresponding data for the test period, if expected to be different from actual experience.

This statement shall include a schedule showing by months, and total thereof, for the same twelve months of actual experience, the company's Gas Account, in the form required by the Commission's Annual Report Form No. 2, page 121. In addition, there shall be shown corresponding data estimated for the test period, if expected to be different from the actual experience.

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**Statement J—Allocation of cost of service by zones.** If the rates on file are zoned, or if it is proposed to establish zone rates, the cost of service for the test period shall be further allocated to the existing or proposed rate zones. A detailed description of methods and procedures used to allocate cost to zones shall be given. Where zones are sought to be established for the first time, the reasons for this establishment and for the zone boundaries selected shall be set forth.

**Statement K—Comparison of estimated revenues with cost of service.** This statement shall consist of a comparison of the total jurisdictional revenues with the allocated cost of service for the test period. Where zone rates are in existence or are proposed, this statement shall also include a comparison of revenues and costs by zones.

**Statement L—Balance Sheet.** A balance sheet in the form prescribed by the Commission's Uniform System of Accounts for Natural Gas Companies as of the beginning of the 12 months of most recently available actual experience and as of the most recent date available, including therein the notes, if any, applicable to the balance sheet.

**Statement M—Income statement.** An income statement in the form prescribed by the Commission's Uniform System of Accounts for Natural Gas Companies for the 12 months of most recently available actual experience, including therein the notes, if any, applicable to the income statement.

**Statement N—**This statement shall contain the principal determinants essential to test the reasonableness of the proposed rate or charge. Any adjustments to book figures, for the items shown below, shall be separately stated and the basis for the adjustment shall be explained. The following data for the test period shall be submitted:

1. Cost of plant by functional classification as of the beginning and as of the end of the test period.
2. Accrued reserve for depreciation, depletion and amortization by functional classifications as of the beginning and as of the end of the test period.

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3. Average working capital by components of the claimed working capital using the averages of the amounts as of the beginning and as of the end of each month of the test period.
4. Rate of return claimed with a brief statement of the basis therefor.
5. Operating expenses by functional classifications.
6. Depreciation, depletion, and amortization expense by functional classifications.
7. Income taxes computed on the basis of the rate of return claimed.
8. Other taxes.
9. Cost of service allocated to the sales or services for which the increase in rate, or charge is proposed, including the principal determinants used for allocation purposes.
10. Comparison of cost of service with revenues under proposed rates.

When this statement is filed pursuant to the second proviso of section 154.63 (b) (3) (i) (a) and the beginning of the 12 consecutive months of the most recently available actual experience is more than one month beyond the 12 months of actual data used in the prior rate-increase filing, the natural-gas company shall also show separately in this statement the actual data for the intervening period for items 1, 2, 5, 6, and 8 above and total sales volumes and revenues for such period broken down between jurisdictional and non-jurisdictional sales.

[Above paragraph added by Order 185, 21 F. R. 1485, Mar. 8, 1956]

(ii) *Preparation for hearing.* A natural-gas company filing for an increase in rates or charges shall be prepared to go forward at a hearing on reasonable notice and sustain the burden of proof imposed by the Natural Gas Act of establishing that its proposed changes are just and reasonable and not unduly discriminatory or preferential.

**Regulations of Federal Power Commission under Natural Gas Act, Part 154, Subdivisions 1-86**

(4) *Submission of material by reference.* If all or any portion of the information called for by paragraph (a) through (d) of this section has already been submitted to the Commission, specific reference thereto may be made in lieu of resubmission in response to these requirements.

(5) *Change in executed service agreement.* Agreements intended to effect a change or revision of an executed service agreement shall be in the form of a superseding executed service agreement only. Service agreements shall not contain any supplements.

**154.64 Cancellation or termination**

When a filed tariff, contract or part thereof is proposed to be canceled or is to terminate by its own terms and no new tariff, executed service agreement or part thereof is to be filed in its place, the natural-gas company shall notify the Commission of the proposed cancellation or termination on the form indicated in § 250.2 or § 250.3, whichever is applicable, at least thirty days prior to the proposed effective date of such cancellation or termination. A copy of such notice to the Commission shall be duly posted. With each notice, the company shall submit a statement showing the reasons for the cancellation or termination, a list of the affected purchasers to whom the notice has been mailed, the sales made or transportation performed and revenues therefrom, by months, for the twelve months immediately preceding the proposed effective date of the cancellation or termination. Actual data shall be used as far as possible, and any estimated data should be designated as such. Such statement shall be subdivided by rate schedules, classes of service, customers and delivery points when more than one is involved: *Provided, however,* That the filing of such notice shall not be construed as compliance with the requirements of section 7 (b) of the Natural Gas Act.

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**154.65 Adoption of tariff by successor**

Whenever the tariff or contracts of a natural-gas company are to be adopted by another company or person as a result of an acquisition, or merger, authorized by appropriate certificate of public convenience and necessity, or for any other reason, the succeeding company shall file with the Commission and post within thirty days after such succession a certificate of adoption on the form prescribed in §250.4. Within ninety days after such notice is filed, the succeeding company shall file a tariff with the sheets bearing the correct name of the successor company, to replace the tariff previously adopted.

**154.66 Changes relating to suspended tariffs, executed service agreements or parts thereof**

(a) *Withdrawal of suspended tariffs, executed service agreements or parts thereof.* Where a tariff, executed service agreement or part thereof has been suspended by the Commission, it may be withdrawn during the period of suspension only by special permission of the Commission upon application therefor and for good cause shown.

(b) *Changes in suspended tariffs, executed service agreements or parts thereof.* A natural-gas company may not, within the period of suspension, file any change in a tariff, executed service agreement or part thereof which has been suspended by order of the Commission except by special permission of the Commission granted upon application therefor and for good cause shown.

(c) *Changes in tariffs, executed service agreement or parts thereof continued in effect, and which were to be changed by the suspended filing.* A natural-gas company may not, within the period of suspension, file any change in a tariff, executed service agreement or part thereof continued in effect by operation of the order of suspension, and which

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was proposed to be changed by the suspending filing, except by special permission of the Commission granted upon application therefor and for good cause shown.

[§ 154.86 added by Order 159, 16 F. R. 2389, Mar. 14, 1951]

**RESTATEMENT OF SCHEDULES FILED PRIOR TO DECEMBER 1, 1948**

**154.81 Application**

Sections 154.82 through 154.86 apply to effective schedules of rates, charges, classifications, practices, regulations and contracts for the transportation or sale of natural gas subject to the jurisdiction of the Commission filed prior to December 1, 1948, which have not been prepared in accordance with §§ 154.31 through 154.41, and for which special exception has not been obtained under § 154.52.

**154.82 Requirement for restatement**

All effective schedules of rates, charges, classifications, practices, regulations, and contracts not prepared in accordance with §§ 154.31 through 154.41 shall be restated and filed as parts of a Tariff in accordance with said sections on or before the dates specified in § 154.83 and duly posted at the time of filing: *Provided, however,* That price provisions which cannot be restated in cents or in dollars and cents per unit, as required by § 154.38 (d), without effecting a change in rates or charges may be retained in effect without change. *Provided, further,* That when necessary, pending completion of restatement within the time provided for by § 154.83, schedules may be filed in accordance with this part as in effect prior to December 1, 1948.

**154.83 Filing date of restatements**

(a) Natural gas companies shall file, in quintuplicate, restatements of their rate schedules as parts of tariffs on or

***Regulations of Federal Power Commission under Natural Gas Act, Part 154, Subdivisions 1-86***

before the dates specified below, unless an extension of time is granted by the Commission upon application and for good cause shown :

***Companies Making Their Major Sales in and Date***

Colorado, Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, Ohio, South Dakota, Utah, West Virginia, Wisconsin, Wyoming: On or before March 1, 1949.

Alabama, District of Columbia, Florida, Georgia, Kentucky, Maryland, New York, New Jersey, North Carolina, Pennsylvania, Tennessee, Virginia: On or before April 1, 1949.

Arizona, Arkansas, California, Kansas, Louisiana, Mississippi, New Mexico, Oklahoma, Texas: On or before May 2, 1949.

(b) With the filing of such restatement there shall be included a letter of transmittal containing a list of the material inclosed and a list of the purchasers to whom it has been mailed.

**154.84 Plan of restatement**

The restatement shall contain the provisions of schedules of rates, charges, classifications, practices, regulations and contracts effective on the date the tariff is filed. However, concurrent with the restatement, a natural-gas company may propose changes in rates, charges, classifications, services, practices, rules and regulations in accordance with § 154.63 of this part. Differences in the phraseology of schedules should be reconciled whenever possible. The effective date to be shown on the tariff sheets shall be that desired by the company, but not less than 30 days nor more than 60 days after filing pursuant to § 154.83.

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**154.85 Status of contracts filed as rate schedules and restated**

Each contract, which is now filed as an effective rate schedule, may be continued in effect and shall be considered as an executed service agreement to the extent that the provisions thereof are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff, until such contract expires by its presently provided terms or is replaced by an executed service agreement in a form contained in the tariff: *Provided, however,* That the natural-gas company, concurrent with the filing of the tariff, shall submit, for insertion in front of each such contract, a statement identifying the provisions thereof which are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff and which are to remain in effect: *Provided further, however,* That agreements intended to effect a change or amendment in such contract may be made only by the execution of a form of service agreement contained in the tariff.

**154.86 Availability of Commission staff for advice prior to formal filing**

Any natural-gas company restating its schedules in accordance with § 154.82 may informally submit a tariff or any part thereof for the suggestions of the staff of the Commission, or may confer with the staff of the Commission to obtain advice on any problem of restatement, prior to submission of the tariff to the Commission for filing and posting.

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**IN THE**

**Supreme Court of the United States**

**OCTOBER TERM, 1958**

**No. 23**

**UNITED GAS PIPE LINE COMPANY,**  
*Petitioner,*  
*vs.*

**MEMPHIS LIGHT, GAS AND WATER DIVISION;  
CITY OF MEMPHIS, TENNESSEE; MISSISSIPPI  
VALLEY GAS COMPANY; TEXAS GAS TRANS-  
MISSION CORPORATION; SOUTHERN NATU-  
RAL GAS COMPANY; and FEDERAL POWER  
COMMISSION,**

*Respondents.*

**REPLY BRIEF FOR PETITIONER UNITED GAS PIPE  
LINE COMPANY**

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**New York, October 15 1958**

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MEMPHIS LIGHT, GAS AND WATER DIVI-  
SION; CITY OF MEMPHIS, TENNESSEE;  
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TEXAS GAS TRANSMISSION CORPORA-  
TION; SOUTHERN NATURAL GAS COM-  
PANY; and FEDERAL POWER COMMISSION,  
*Respondents.*

No. 23

**REPLY BRIEF FOR PETITIONER UNITED GAS PIPE  
LINE COMPANY**

The combined brief of respondents Memphis Light, Gas and Water Division, the City of Memphis, Tennessee, and Mississippi Valley Gas Company in this matter and in Nos. 25 and 26 (all consolidated for argument by this Court's order of February 3 1958), permits a focusing of the issues into small compass.

**I**

**RESPONDENTS' MISAPPREHENSION AS TO  
GOVERNING CONTRACT**

It being common ground that the Natural Gas Act did not impair or modify the contractual powers of the natural gas companies, (as stated in the *Mobile* case 350 US 332 at

343), respondents have been at pains to make it appear that the contracts (executed service agreements) in the present case are "indistinguishable" from that in the *Mobile* case. Thereby they have quite misconceived and misstated the issue here.

**(a) Misuse of "unilateral" from *Mobile* case**

To the exact terms of the ten-year fixed-price contract with appurtenant resale contract also at fixed price (summarized in the *Mobile* opinion 350 US at 336; see also our main brief pp. 33, 61) respondents pay no attention. They give no weight to the "precise facts", averring that this Court addressed itself to "the broad question presented" (br. 31 fn. 19). Respondents try to assimilate the contracts in the two cases by a process of incantation. They claim to show that on a proper interpretation "the contracts in this case and in *Mobile* are indistinguishable" (br. 24 and fn. 14, repeated at br. 29 fn. 18). They assert that this case involves "a basically similar factual situation" to that in *Mobile* (br. 30). They treat our filing in the *Mobile* case as "precisely of the same nature and character as the filings in this case" (br. 51).

This continued insistence on parallelism between two states of fact (widely different as we assert) is accompanied in respondents' brief by endless reiteration of the word "unilateral". This word respondents apply to the rate changes which petitioner made in its September 30 1955 filing; which came into effect April 1 1956 (our main brief p. 5). The fact that these filings were made under permission of the "any effective superseding rate schedules" clause in the executed service agreements and that no such clause appeared in the *Mobile* contract, respondents ignore. The fact that the permission granted by such clause to make the filings, arose out of an executed service agreement and that the new filings have thus a bilateral sanction (as recog-

nized even by the Court of Appeals, 250 F. 2d at 406), respondents disregard. This position they take in order to stigmatize the filings as "unilateral", a word 58 times employed by them for this purpose throughout the brief.<sup>1</sup> The purpose again is to assimilate this case to the *Mobile* case where the Court necessarily characterized the change of rate as a unilateral change because there was no contract clause permitting it, and rested its decision on that basis (350 US at 337; cf. 342 "If the purported change is one the natural gas company has the power to make...").

In pursuit of this strategy respondents even transpose this Court's language with respect to the terminology of the Natural Gas Act, to the *contractual* provision for change here appearing (br. 50), although it was the very absence of a contractual process for rate revision in the *Mobile* case which there led to a resort to the statute for that purpose.

**(b) Asserted conflict between *Mobile* case and the Regulations**

Against this misconception of the contracts here involved, we need only refer to our description of the price clause in the executed service agreements, as explicit contractual provision for the rate change approved by the Commission (main brief p. 15)—a price clause fully articulated with the Act and the Regulations of the Commission (our main brief pp. 17-8). Our analysis of these words as words of art derived from and finding their significance in the Regulations is nowhere noticed in the careful and

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<sup>1</sup>We do not overlook the fact that the Commission itself in Opinion 295 described the changes contemplated by the "any effective superseding rate schedules" language as "unilateral changes to be proposed by United" (R 231). This sentence follows the Commission's analysis of the words in question as expressing a *bilateral* arrangement for change, and is explained by the further statement of the Commission that the purchasers had "no correlative right under the statute" to propose changes of rates (R 232).

extensive brief of respondents.<sup>2</sup> Instead, every effort is made by them to assimilate to the present case the quite special facts of the *Mobile* case, even to the length of calling the rate change which this Court there condemned an "effective superseding rate schedule" (br. 51). The method of dispute by nomenclature to the exclusion of meaning could not go further.

It is perhaps significant that, while purportedly a response to our main brief which explains the service agreements in the context and upon the basis of the controlling Regulations, respondents' brief does not really deal with this argument at all. Can the reason be that in order to do so respondents would be compelled to attack Reg. Part 154 as invalid? The City of Hattiesburg as *amicus curiae* goes to this extreme and pitches the alleged invalidity of the Regulations on the *Mobile* case as follows (br. 23):

"True enough, Section 154.38 of the Commission's Regulations under the Natural Gas Act purports to authorize contracts between natural gas companies and their customers which permit the filing of rate proposals under Section 4 of the Act, and the validity of that regulation has never been specifically deter-

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<sup>2</sup>A diversionary attempt is made by respondents to explain the words as inserted to preclude the defense of illegality or impossibility based upon Commission action (br. 51-2). It would have been unnecessary to insert these words for a purpose to which the parties would have been bound even without their employment. The price provisions of the service agreements (R 78) state that the agreements are subject to the General Terms and Conditions attached to the rate schedules Section 14 of which provides:

"This Tariff and any Service Agreements thereunder, is expressly made subject to all present or future valid rules, regulations or orders of any commission or regulatory body having jurisdiction." (R 45)

Thus the parties when executing the service agreements expressly contracted to be bound by any valid order of the Commission. They recognized that the service agreements were executed subject to the paramount authority of the Commission to alter the rates therein provided. Cf. *Veix v. Sixth Ward Assn.* 310 US 32, 38 (1940).

mined. However, the *Mobile Case* necessarily, albeit impliedly, holds it to be beyond the Commission's statutory power to enact."

**(c) Respondents' treatment of provision as "right to file"**

Respondents accept at least *arguendo* our description of the intended import of the "effective superseding rate schedules" provision as establishing a mechanism for rate change, or what respondents call a "rate-changing procedure" (br. 24-5). This, one might have thought enough to make them see that the change of rate effected by such an agreed procedure was in essence bilateral (apart from the review powers of the Commission) and that the word "unilateral" sown through their brief is a misnomer. They seek to avoid this conclusion, however, by treating the agreed mechanism for rate change as a mere right to file (br. 26), ignoring the fact that a right to file changes under Section 4(d) imports the effectiveness of the new rate at the end of 30 days or, if suspended, at the end of the five months' period (Section 4[e]). That is, what respondents call a "right to file" eventuates in a perfected rate under the procedure laid down by the statute. Again respondents try to depreciate the agreed procedure for change by treating it as an ineffective "arbitration procedure", a misconception sufficiently dealt with in our main brief (p. 47).<sup>3</sup>

<sup>3</sup>The argument of counsel cited by respondents (br. 27) does not reduce the filing to a mere arbitration. While counsel for Southern used the word "arbitrator" (R 4) he coupled the word with "under its [the Commission's] powers granted by Section 4(d) and 4(e) . . ." Counsel for United did not use the word "arbitrator" at all. He did employ in a pleading the somewhat literary phrase "subject to the arbitrament of the review which the Commission had undoubted power to make equally and coextensively under Section 4(e) and 5(a)" (R 208-9). Respondents are wrong in saying that this petitioner described the rate change procedure as an arbitration procedure (br. 12). Calling it an arbitration would not, in any event, make a filing under Section 4(d) of the Act an arbitration in any sense such as to divest the Commission of its statutory powers and duties.

Similarly with the word "proposals" which respondents pick up (br. 28) for the purpose of trying to show that the new rate agreed to be filed was not a "consummated" rate. But the statute itself in Section 4(e) describes the filed change of rate, in connection with the suspension period, as a "*proposed* change of rate". At br. 38 and 50-1 respondents argue that under the rate-changing procedure envisaged by the service agreements United had "no consummated contractual right to the rates which it filed". They say the changed rate is effected by an order of the Commission and not by virtue of the natural gas company's own action. They claim that rates so filed are not eligible for filing because they never attained the status of "effective superseding" rates. This is of course a circular argument.

In respondents' view the phrase "or any effective superseding rate schedules on file with the Federal Power Commission" is mere hash, because no rate can become effective until it supersedes and it cannot be filed until it has become effective, which state under the regime of the statute can be brought about only by filing. Thus, in respondents' view, the contracting parties intended to say nothing by this phrase.

Actually the true statutory sense of the word "effective" derived from the employment of "effect" in Sections 4(d) and 4(e), is perfectly clear. It is described at pp. 17-8 of our main brief which shows that the parties contracted for a procedure of rate change which might go into effect and create a new operative rate without Commission action. Thus the statement by respondents (br. 50):

"On the face of it, the agreement is to pay a new rate *only* when it has become 'effective' to 'supersede' the existing rate."

is perfectly correct and does not support their argument. On the other hand the statement (br. 51):

"Nowhere in the provision can agreement be found that new rates shall become effective simply by the filing of proposed new schedules with the Commission, followed by contested rate proceedings and a rate-changing order of the Commission."

is entirely wrong, because that is exactly what the words "or any effective superseding rate schedules" do mean in the context of the Regulations and the statute. We add that a "rate-changing order of the Commission" is not essential to the new rate's becoming effective, as Sections 4(d) and 4(e) make perfectly clear.

As part of the argument just dealt with, respondents assert that something in the *Mobile* decision or something in the statute prohibits the filing of a changed rate until that change has been consummated (br. 33, 38, 51). This seems to mean that the seller "must have already perfected its contractual right" to the change (br. 33)—else the new rate cannot be filed. This is just another way of saying that the *Mobile* case decided the *Memphis* case.

For the instant case, where the parties have contracted for "effective superseding rate schedules" in addition to the current filed schedule, there is nothing either in the *Mobile* case or in the statute which says that the Commission has no jurisdiction to review a filed rate until the buyer has agreed not to contest the amount of the new rate, if that is what respondents mean by the perfecting of contractual rights or a "consummated contract right" (br. 33). The parties could not thus by their contract oust the jurisdiction of the Commission. In the same manner the assertion that proceedings under Section 4(e) are limited to review by the Commission of rates "agreed to" by the contracting parties (br. 12, 52) is erroneous unless taken to include the type of agreement in suit here.

Contrary to the assumption of respondents (br. 24), the rate-changing procedure agreed upon by the parties does not

purport to "confer jurisdiction on the Commission", but only accepts the jurisdiction vested in it by the statute itself (our main brief p. 32).

**(d) Houston Texas Gas & Oil Corp. 17 FPC 303**

In connection with consideration of the "effective superseding rate schedules" language as a rate-changing procedure, respondents urge that it does not comply with the requirement of "certain specified conditions" in Reg. 154.38(d)(3) (br. 62). They claim that the Commission so ruled in *Houston Texas Gas & Oil Corp.* 17 FPC 303 (1957). This we believe to be a complete misunderstanding of the Commission's order there entered under date of February 21 1957 with respect to tariffs of Coastal Transmission Corporation and Houston Texas Gas & Oil Corporation. What the Commission said was (p. 305) that the form of service agreement could not authorize the seller or buyer to propose changes in the seller's tariff "as Buyer and Seller have agreed upon and which are set forth hereinbelow . . .:" followed by a blank space in which the parties expected to fill in details at some subsequent date for particular transactions. The evil of such a form of service agreement was illustrated by the fact that the seller and buyer then executed a service agreement which proposed changes affecting rates referable to a document which was not on file with the Commission (p. 305).

Evidently the purpose of this ruling was to prevent the seller from filing a form of service agreement which amounted to a blank check, in that the buyer would be tied to certain proposed changes without their being enumerated in the filed tariff. In consequence the seller would be in a position of making different bargains with different buyers by filling in the blanks in a discriminatory or preferential manner. The opinion thus has nothing whatever to do with

the operation or significance of the "effective superseding rate schedules" provision. That this is so clearly appears from an inspection of the service agreements filed with the Commission in that case, each of which contains that provision. The failure of the Commission to comment upon the provision in connection with its ruling would seem to be conclusive that respondents err in treating it as a violation of the Commission's rules (br. 62-3).

**(e) Asserted mistake of law**

Respondents indeed confess that they themselves had the same contractual intention as the petitioning pipe line companies. While accusing United, Texas Gas and Southern of arguing that the "effective superseding rate schedules" provision must be interpreted "in the light of their misconception" (br. 9-10), respondents also admit that they shared this misconception. They say (br. 54, fn. 30):

"Until *Mobile* was decided, respondents, like petitioners, shared the same misconception of the Act and considered Section 4(d) as providing a procedure for unilateral rate change proposals."

That is, respondents, like petitioners, intended that there should be flexibility of rate in accordance with such changes in cost as the Commission should ultimately find to be justified under the statutory standards, and they also intended that such changes be put into operation by the type of filing which respondents now call "unilateral". As consented to by respondents, it was plainly part of a bilateral arrangement. The fact that, as decided in the *Mobile* case, a newly filed rate schedule cannot override a fixed contract rate lacking provision for change, does not authorize the respondents to avail of their asserted mistake of law to retreat from their admitted agreement. Mutual mistake of law, even

where it exists, does not destroy the contract. 5 Williston on Contracts (1937 ed.) § 1588. A contract made upon a given understanding of the law cannot be set aside upon the ground of a change due to subsequent judicial interpretation or the parties' discovery of error in their common belief: *Bank of the United States v. Daniel* 12 Pet. (37 US) 32, 55-6 (1838); *Granger v. Granger* 179 N. Y. Misc. 659 (1943); *Bagby v. Martin* 247 Pac. 404, 118 Okla. 244 (1926). As to respondent Mississippi Valley we have already pointed out that it executed its service agreements with full knowledge of the decision of the Third Circuit Court of Appeals in the *Mobile* case (our main brief p. 39).

#### (f) Application of posted price cases

The application to the type of contract represented by the service agreements here of the rule of law illustrated by the posted price cases (our main brief pp. 41-8) receives only slight attention in respondents' brief (br. 33 fn. 20). Respondents assert these decisions are beside the point for the reason that the service agreements specify no "formula" and no way of ascertaining the price "by reference to definite and readily available data". They attempt no discussion of the authorities, which would show that application of the rule is not restricted to the statement of a formula. The parties need only agree upon a standard or test which is at once independent of their further consent and determinative of the question in hand. *Brassert v. Clark* 162 F. 2d 967, 971 (CA 2 1947). The concept "formula" was held by the Tenth Circuit in the *Cities Service* case 233 F. 2d 726 to cover and include a contract for the purchase of gas at the prevailing field price at the wellhead for designated fields with adjustments from time to time to reflect new prevailing field prices; this, the court said (p. 730), was an employment of terms with a definite and well-under-

stood meaning in the oil and gas industry notwithstanding the absence of explicit methods of calculating field prices. The exhaustive data required by Reg. 154.63 to be set forth in statements A through N (App. 20a-36a) are far more definite and also more readily available than in any recorded case which passes on a price fixed by an external standard.

The *Reconstruction Finance Corporation* case 113 F. Supp. 468, 204 F. 2d 511 (CA 2 1953) sustained as enforceable contracts for the purchase of ethyl alcohol at prices not to exceed the maximum price of the seller as determined in accordance with Office of Price Administration procedure under its General Maximum Price Regulations (113 F. Supp. at 475), such maxima to be subject to protest by the seller to the OPA and appeal by him to the Emergency Court of Appeals (204 F. 2d 511). The Second Circuit Court of Appeals approved the reasoning by which the District Court examined the intent of the parties in the context of the administrative regulations (113 F. Supp. at 479-81). The Fourth Circuit Court of Appeals in *Pfotzer v. United States* 176 F. 2d 675 (1949) sustained a contract for the sale of comminutors at a specified price with an escalator clause providing for increase "by the amount of price increase application on file with OPA prior to shipment, or to legal price in effect at time of shipment". The Sixth Circuit Court of Appeals in the *Memphis Furniture* case 2 F. 2d 428 (1924) upheld a contract for the sale of furniture "subject to prices in effect on shipping date . . .", and at p. 432 discussed the provisions of the agreement by which the price was rendered sufficiently certain. The same court in the *Ken-Rad* case 80 F. 2d 251 (1935) enforced an agreement to sell and to buy at list prices to be established from time to time by the manufacturer, less specified discounts with the right reserved to the manufacturer to change the discounts when competitive market conditions

warranted, and at p. 253 discussed the elements in the contract which rendered price and quantity sufficiently definite.<sup>4</sup>

The present is a typical case for enforcement of a method of price change in accordance with a stipulated external standard. The external standard here applicable is clearly determined by the service agreements and by comprehensive Regulations (our main brief pp. 12-3, 17-8, 23-6). The new price derives from the seller's filing it together with the detailed information which the Commission requires (our main brief pp. 13, 23) and such action as the Commission shall determine to take under its statutory authority. The change of price can in no sense be considered as being "set by the whim of the vendor", as the Attorney General of the State of Wisconsin would have it (*amicus* brief p. 19). This is not a case where the price is determined by the wish or will of one of the parties or where the pricing method adopted "will fix no certain amount" (Wisconsin *amicus* brief p. 17.)

While respondents view the "just and reasonable" standard of the Act as insufficiently definite (br. 33 fn. 20), it is to be remembered that that is a standard for judicial review. The standard envisaged by the parties in adopting the filed tariff and service agreement form of contract is the single definite rate which emerges from the administrative review after the seller's new filing. In the majority opinion in the *Montana-Dakota* case 341 US 246, 251, from which respondents quote at br. 34 fn., the sentence immediately following their quotation makes the point clear:

"To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission."

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<sup>4</sup>This is one of the cases which the Attorney General for Wisconsin in his *amicus* brief considers to "contain difficult language that would appear to contradict" his contentions as to the applicability of the posted price rule to the present situation (br. 18).

This produces the "certain amount" which the authorities contemplate.

Given the basic misapprehensions of respondents as to the nature of the contract in suit and their misapplication to it of the *Mobile* decision, the rule of the posted price cases in relation to the facts and the administrative history of this type of contract are alone sufficient to dispose of this case.

## II

### RESPONDENTS' ARGUMENT ON "CONTEMPORANEOUS EVIDENCE"

Notwithstanding their concession (br. 54 fn. 30) that they themselves contemplated a rate-changing procedure through the combination of the "effective superseding rate schedules" language and Section 4(d), respondents say that this petitioner did not regard the language as adequate because it tendered in its original form of service agreement additional language which the Commission rejected (br. 57). This rejected language consisted of three sentences in an original FPC Gas Tariff, proposed for insertion both in the General Terms and Conditions and in the form of service agreement. Together with the rejected language appeared the "effective superseding rate schedules" provision. The correspondence between the Commission and United Gas Pipe Line Corporation is dated June 27 and July 3 1952 and appears at R 283-99.

Respondents cannot in our submission derive from this exchange any support for their contention in view of the facts that—

(a) The "any effective superseding rate schedules" language was already established in the industry as a formula to authorize revisions of rate by new filings and

had been in use for that purpose since 1945 at least (our main brief pp. 22, 53);

(b) The additional language, which could therefore be viewed as surplusage, was objected to by the Commission as being a rate escalator provision prohibited by Reg. 154.38(d)(3) from being inserted in any portion of the tariff (R 283) which by definition includes the form of service agreement (Reg. 154.14, App. 9a);<sup>5</sup>

(c) Support existed for the Commission's view in the fact that the language objected to contained the provision "... Seller shall have the right to revise its rates to reflect such change";

(d) While not insistent upon any right of automatic rate increases, this petitioner had throughout been most insistent upon holding open the opportunity to make adjustments in price to reflect rising costs (our main brief pp. 10, 18-9);

(e) The Commission itself, whose interpretation in the 1952 correspondence is here invoked as "contemporaneous construction", has consistently employed the "effective superseding rate schedules" language without more as authority for acting upon new filings (our main brief p. 53), and did so in this case after the *Mobile* decision.

This is not "contemporaneous construction" in favor of respondents' interpretation. Indeed the fact that counsel for respondents who participated in drafting the letter

<sup>5</sup>This interpretation of the rejected language as an automatic escalation is accepted and put forward by respondents in their brief in opposition to certiorari at p. 15 (quoted in our main brief p. 21). Their admission is reinforced by the fact that counsel who signed this brief is the same individual designated as RG at the end of the Commission's letter as one of its authors (R 287), he having been at that time in the employ of the Commission.

to United, has himself conceded the vice of the rejected language to be its provision for automatic rate increases by this concession puts the so-called "contemporaneous evidence" out of the case.

The same history destroys the *contra proferentem* argument of respondents. To call this petitioner "author of the provision" (br. 25) is plainly erroneous in view of the long-standing use of the formula "any effective superseding rate schedules" in the industry back to 1945 (our main brief p. 22). While United did in 1952 adopt the provision because of its established meaning in the industry, the statement at br. 56 that United "created" and "drafted" it is contrary to the fact.

### III

#### INDUSTRIAL SALES AS EVIDENCE OF INTENT

By express decision of Congress carefully considered, the statute does not permit suspension of newly filed rates "for the sale of natural gas for resale for industrial use only" (Section 4[e]) which are covered by Part 155 of the Regulations. Respondents and various *amici* argue strenuously that purchasers for resale for industrial use only, as to whom increases of rate could not be suspended, would not have consented to the rate change by the seller's filing and awaiting Commission review. The reasons for the special treatment by Congress of industrial sales are set forth in our main brief at p. 58, and relate to the availability of competitive fuels, the short-term nature of such contracts, the use of gas cost escalation clauses in resale contracts.

Respondents have badly distorted the proportions of this relatively minor item in gas sales. At br. 17 and 67 they represent the sales of Mississippi Valley for industrial purposes as being 64.9% of the volume purchased from

United; but they fail to point out that these include all sales which went to industrial use and are not limited to the "industrial use only" sales made by Mississippi Valley of gas purchased by it for resale, which are the only purchases that had the non-suspendible feature. Many of the gas sales reported by Mississippi Valley as "industrial" are in reality diversions for industrial use from purchases under a suspendible general rate schedule.

This distinction, which respondents totally disregard in their argument, brings in a strong element of distortion. For example, while the Mississippi Valley annual report to stockholders for 1957 shows that it distributed 17,609,498 Mcf of gas to "industrial" customers, its annual reports filed with the Federal Power Commission show that only 1,903,000 Mcf were purchased by Mississippi Valley in that year under industrial-use-only rate schedules. The balance Mississippi Valley provided to industrial customers out of gas purchased under general rate schedules, increases in which would be *suspendible* under Section 4(e), and also out of its own production. The entire quantity of gas purchased by Mississippi Valley for industrial use only was purchased from United for resale to four large-volume customers (cf. R 61).

Out of the total of 17,609,498 Mcf of gas distributed to industrial customers by Mississippi Valley in 1957, the 1,903,000 Mcf purchased by Mississippi Valley from United for industrial use *only* (to which alone the provision against suspension of increases applies) were only about 20% of its purchases from United, instead of the 64.9% represented by respondents at br. 67. These purchases for industrial use *only* were only 11% of Mississippi's reported "industrial" sales and only 6% of its total sales of 32,794,066 Mcf in 1957 as reported to its stockholders.

Further indication how this minor aspect of the problem has been inflated by respondents is the fact that of United's total sales under its tariff only 1.8% or 8,763,355 Mcf in

all are made under rate schedules for industrial use only. Of the four pipe line companies from which Mississippi Valley purchases gas, only two, viz. United and Texas Gas, have industrial-use-only rate schedules in addition to their general service rate schedules. Mississippi Valley purchases from Texas Gas no gas under its rate schedule for industrial use only. Texas Gas itself sells only 0.5% of its total sales under industrial-use-only rate schedules. For the pipe line industry as a whole, out of the 80 major pipe line companies which file rate schedules with the Federal Power Commission, only seven had any industrial-use-only rate schedules in 1957.

Even more, purchasers from the pipe lines who buy for industrial use regularly protect themselves with escalation clauses which permit proportionate increases to the industrial users. Thus Mississippi Valley's rate schedule 73-C, entitled "Large Volume Industrial Gas", provides for adjustments of net monthly rate not only for heat value and additional taxes but for any increases in the cost of gas, as follows:

"First—Plus any increase, or minus any decrease, in the cost to Company for gas purchased for delivery in the Area in which this rate schedule is applicable, above or below the cost based upon its contract price as of August 1, 1954."

This is identical with the escalation clause which Mississippi Valley has inserted in its other rate schedules applicable to "Natural Gas Service" and "Natural Gas Fuel Service". Thus this respondent, whose supposed injury from non-suspendible industrial rates is so strongly urged by counsel, is fully covered in respect of any increase of rates which might arise from the intended operation of the "effective superseding rate schedules" clause.

Willmut Gas and Oil Company, referred to as selling 45% of its annual volume for resale for industrial use only (br. 67 fn. 39) and itself making much of this percentage in its brief *amicus* under the name of City of Hattiesburg (p. 24), sells this gas to a single customer, Hercules Powder Company. Its contract with Hercules provides specifically for an increase in its charges to that customer equal to increases in the filed rates for natural gas purchased by Willmut (Large Volume Industrial Schedule No. 104). This provision appears under the heading "Adjustments" and reads:

"1. (a) If, under the jurisdiction of a duly constituted regulatory body, any rate applicable to natural gas purchased from a pipeline company for resale to large volume industrial use only natural gas service in the Hattiesburg area, as above defined, is increased or decreased on or after the effective date of this rate schedule and such increase or decrease in rate or tariff, *whether or not charged under bond*, results in an increase or decrease in the cost of gas purchased by the company applicable to this service, *such increase or decrease in the cost of gas shall be added to or subtracted from the charges per Mcf for gas supplied in each subsequent billing period beginning not earlier than the effective date of such increase or decrease.*" (italics ours)

These escalator clauses of Mississippi Valley and of Willmut on the resale side point up the distinction of this case from the *Mobile* case where the purchaser had no right to increase its charge to the Ideal Company in accordance with subsequent rate increases to it, the Mobile-United contract being at a fixed rate for a fixed term. It also demonstrates that both Willmut and Mississippi Valley understood the import of the "effective superseding rate schedules"

language<sup>6</sup> in their service agreements with United to be exactly as the Commission found practically all United's customers understood it (R 235), viz. as meaning that the rate to be charged shall be the effective rate on file from time to time with the Commission (R 230). Had they believed that United could make no increases without their prior specific agreement, they would not have protected themselves in respect of their own customers. Indeed, escalation clauses with reference to their own customers would have been improper to cover a situation where either Willmut or Mississippi Valley *voluntarily accepted a negotiated* increase. Not only they but their customers must have understood that the increase would be initiated by the original sellers and pass the review and scrutiny of the Federal Power Commission. They intended to consent to superseding rates so originating and so made effective.

Whatever the asserted hardships of any particular rate "for resale for industrial use only", the Court will bear in mind that the non-suspendibility feature has been in the Natural Gas Act from the beginning, as the result of the mature and considered decision of Congress (our main brief p. 58). It has been retained in the Act notwithstanding frequent recommendations to Congress to make these rates also suspendible. The non-suspendibility feature remains in the Act as matter of legislative policy, and the contracts of industrial users were made with full knowledge.

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<sup>6</sup>The Court has been favored with a 77-page *amicus* brief signed by counsel for the City of Hattiesburg containing appendices of 107 pages. In addition to a long-terminated controversy in the Commission entitled Docket No. G-1158, this material contains argument predicated largely upon a contract between United and Willmut executed August 20 1943. Counsel nowhere clearly state that this contract was terminated and superseded by three service agreements dated May 6 1955. Each of these in express terms "supersedes, cancels and terminates" the gas sales contract of August 20 1943 so largely utilized in this *amicus* brief (pp. 28-36 of record in Court of Appeals for the District of Columbia No. 13,683, *Willmut Gas and Oil Co. v. Federal Power Commission* 251 F. 2d 381).

**CONCLUSION**

**THE JUDGMENT OF THE COURT OF APPEALS  
SHOULD BE REVERSED AND THE ORDER OF THE FED-  
ERAL POWER COMMISSION REINSTATED.**

Respectfully submitted,

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**Nos. 23, 25, and 26**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1958**

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**UNITED GAS PIPE LINE COMPANY, FEDERAL POWER  
COMMISSION, TEXAS GAS TRANSMISSION CORPORATION,  
AND SOUTHERN NATURAL GAS COMPANY, PETITIONERS**

**v.**

**MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.**

---

**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**BRIEF FOR THE FEDERAL POWER COMMISSION**

---

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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1958**

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**Nos. 23, 25, and 26**

**UNITED GAS PIPE LINE COMPANY, FEDERAL POWER  
COMMISSION, TEXAS GAS TRANSMISSION CORPORATION,  
AND SOUTHERN NATURAL GAS COMPANY, PETITIONERS**

**v.**

**MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.**

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**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**BRIEF FOR THE FEDERAL POWER COMMISSION**

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## **OPINIONS BELOW**

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 263-271) is reported at 250 F. 2d 402. The opinion of the Federal Power Commission (R. 225-237) is reported at 16 F. P. C. 19 and at 15 P. U. R. 3d 279.

## **JURISDICTION**

The judgment of the Court of Appeals was entered on November 21, 1957 (R. 272). The petition for a writ of certiorari in No. 23 was filed on December 27, 1957, in No. 25, on December 30, 1957, and in No. 26, on December 31, 1957. They were granted on February 3, 1958. The jurisdiction of this Court

rests upon 28 U. S. C. 1254 (1) and Section 19 (b) of the Natural Gas Act, 15 U. S. C. 717r (b).

#### QUESTION PRESENTED

Whether, under this Court's decision in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332, the filing of schedules increasing a natural gas company's rates for jurisdictional sales of natural gas must be rejected by the Federal Power Commission where, although the purchasers have not agreed to the specific amount of the increase, the existing agreements with the purchasers reserve to the natural gas company the right to change its rates, subject to the Commission's power of review under Section 4 (e) of the Natural Gas Act.

#### STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, 15 U. S. C. 717 *et seq.*, and of the Commission's regulations under Order No. 144 (18 C. F. R. 154.1 *et seq.*) are set out in Appendix A, *infra*, pp. 118-128.

#### STATEMENT

In the course of Federal Power Commission hearings on new gas rate schedules which United Gas Pipe Line Company, a natural gas company subject to the Natural Gas Act, had filed with the Commission under Section 4 (d) of the Act, *infra*, p. 119, respondents Memphis Light, Gas and Water Division, City of Memphis, and Mississippi Valley Gas Company filed motions to reject the schedules on the ground that they constituted an attempt, unilaterally, to increase contract rates without the purchasers' consent, in

violation of this Court's holding in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332 (R. 143-148, 162-168). In denying the motions, the Commission held that, even though the purchasers had not agreed to the dollars and cents amount of the increase, the rate schedules were properly filed under *Mobile* since United's service-agreements with its purchasers contemplated and agreed to such filings by United (R. 225-237). Reading *Mobile* as prohibiting a natural gas company, which was selling gas under service-agreements, from increasing rates by filing new schedules under Section 4 (d) unless the purchasers had agreed to the precise increase as well as to the filings under Section 4 (d), the court below reversed (R. 262-272).

*Background of the present proceedings:* When the Natural Gas Act was enacted in 1938, the Commission permitted the natural gas companies subject to its jurisdiction to file their existing sales contracts as rate schedules so that the contract rates became the effective legal rates. These contracts had been individually negotiated with each purchaser, with the result that the contracts, and the rates defined therein, varied greatly in amount as well as form. Shortly after the Act's passage, the Commission initiated a program of system-wide tariffs in order to provide uniform rates governing equivalent sales and to eliminate price discrimination among customers. To that end, the Commission, in August 1940, circulated among the pipeline companies for comment "Tentative Instructions for Preparing and Filing F. P. C.

Rate Schedules" under which the contractual rate schedules would be converted to prescribed tariff forms. The advent of World War II made it impossible to go forward with this undertaking; however, a substantial number of pipeline companies cooperated with the Commission by voluntarily converting their rate forms from contracts to tariffs.<sup>1</sup>

Thereafter, in April 1948, the Commission, noting that the experience under the voluntary conversions demonstrated "the feasibility and desirability of such a change and that benefits and advantages may be expected to result to the public and natural gas companies" (13 Fed. Reg. 2046), again proposed amendment of its rate regulations to establish the tariff system. 13 Fed. Reg. 2045-2050. Upon receiving suggestions and comments from interested persons, the Commission revised the proposed regulations and again invited comments. 13 Fed. Reg. 5214. After the receipt of further suggestions, the Commission made additional revisions in the proposed regulations and, in October 1948, issued the regulations as Order No. 144. 13 Fed. Reg. 6371 *et seq.*<sup>2</sup>

Order No. 144 (Appendix A, *infra*, pp. 122-128) which has been in effect since that time and which (with a few minor amendments not here relevant)

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<sup>1</sup> Prior to this conversion, the companies had on file with the Commission separate rate schedules consisting of almost 7,000 pages. The substituted tariffs comprised only 388 pages. See 13 Fed. Reg. 6371.

<sup>2</sup> For further summaries of the history of Order No. 144, see 13 Fed. Reg. 6371-2; *United Gas Pipe Line Company*, 16 F. P. C. 10, 11-12.

is still operative (18 C. F. R. 154.1 *et seq.*),<sup>2</sup> requires the conversion of all rate contracts into tariff-and-service-agreement form, as well as the restatement of all rates in cents or in dollars and cents per unit.<sup>4</sup>

In a tariff-and-service-agreement method of rate making, unlike the earlier contracts, the buyer and seller do not agree in advance on a specific rate for a definite period of time through individual contracts tailored to a particular transaction. Rather, the seller files rate schedules of general applicability, stating the price at which it will sell gas to all its customers within a given zone or class. In addition, it enters into service-agreements with its customers which provide for the amount of gas to be sold and the duration of the sale. These agreements do not contain a price term, but merely refer to the effective filed rate at the particular time or as it may be superseded. See also *infra*, pp. 39-44.

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<sup>2</sup> Order No. 144 now applies only to pipeline companies, special provision having been made for independent producers by Commission regulations concerning the rates of the latter. 18 C. F. R. 154.91 *et seq.*

<sup>4</sup> To meet special situations, however, the Commission reserved the right to permit the filing of contracts as rate schedules. See Section 154.52, *infra*, p. 125. In addition, under Section 154.85, *infra*, p. 127, a contract already on file as an effective rate schedule might be continued in effect as an executed service-agreement to the extent that its provisions "are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff \* \* \*." The only exception permitted to the requirement of restatement was where price provisions could not be restated without effecting a change in rates or charges. See Section 154.82, *infra*, p. 127.

Order No. 144 was generally accepted by all parts of the industry.' As of December 1957, there were 1,100 service-agreements\* filed with the Commission, compared to 141 other contracts of various types filed under Sections 154.52 and 154.85 of the Order (*supra*, p. 5).'

*The present proceedings:* United's sales of gas to Texas Gas Transmission Corporation, Southern Natural Gas Company, and Mississippi Valley Gas Company, as well as sales to United's other customers, were made under service-agreements and a tariff filed with the Commission in accordance with Order No. 144. As prescribed by that Order, no rate was fixed in the service-agreements; instead, the agreements, which were in the standard form contained in United's tariff (see *supra*, p. 5), provided (R. 64):

\* Review of Order No. 144 was sought only by United and Michigan Consolidated Gas Company. See *United Gas Pipe Line Co. v. Federal Power Commission*, 181 F. 2d 796 (C. A. D. C.), certiorari denied, 340 U. S. 827; *United Gas Pipe Line Co. v. Federal Power Commission*, D. D. C. Civil Action No. 4680-50. United, however, agreed to dismiss the district court proceeding as part of the settlement approved by the Commission in *United Gas Pipe Line Co.*, 13 F. P. C. —, Op. No. 277, issued November 2, 1954.

\* The 1,100 service agreements include 80 pre-existing contracts, the price terms of which have been restated pursuant to Section 154.85 of the Commission's regulations, *supra*, p. 5, fn. 4.

\* The 141 other contracts include 18 special sales contracts of the type involved in *Mobile*, the balance consisting of special agreements for gas transportation, exchange and storage, and operating arrangements.

All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule (the appropriate rate schedule designation is inserted here), or any effective superseding rate schedules on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached thereto and filed with the Federal Power Commission which are by reference made a part hereof.

This tariff, the so-called "settlement tariff" (see fn. 5, *supra*, p. 6), had been filed by United with the Commission effective August 1, 1954, with the consent of Southern, Texas Gas, and Mississippi Valley, as well as with the approval of the Commission (R. 533; *United Gas Pipe Line Co.*, 13 F. P. C. —, Opinion No. 277, November 2, 1954). The terms of the tariff, which governed all of the sales here in question, had the effect of resolving disputes concerning the rate, included in United's original conversion tariff governing the same sales, which had been filed with the Commission effective August 3, 1952, pursuant to Order No. 144 (*ibid.*). As already noted, the "settlement tariff" contained a standard form service-agreement with uniform terms governing the duration and other conditions of the sales, but no price term (R. 399-418).\*

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\* The General Terms and Conditions and service-agreement form reprinted in the record (R. 21-50) are those contained in United's conversion tariff. However, these are identical for all relevant purposes with the provisions of the "settlement tariff."

Five of the seven sales agreements here involved follow this standard service-agreement form (R. 61-74j; 92-99, 108-114). The other two sales agreements, one with Southern dated May 7, 1951,\* and the other with Texas Gas dated April 16, 1945, were in the form of the original sale contracts executed by United with the purchasers (R. 83-88, 100-108). The tariff provided that contracts in effect on August 1, 1954, could be continued as service-agreements to the extent not superseded by or in conflict with the rate schedules and the General Terms and Conditions of the tariffs (R. 44). The price terms of the two contracts, as the Commission expressly found (R. 234, 247), were annulled by the foregoing provisions. See *infra* p. 115, fn. 65. As we have pointed out, the tariff provisions including the provisions of the standard-form service-agreements were expressly agreed to by the purchasers (*supra*, p. 7). See *United Gas Pipe Line Co.*, 13 F. P. C. —, Op. No. 277, issued November 2, 1954.

On September 30, 1955, United filed new rate schedules with the Commission under Section 4 (d) of the Act, *infra*, p. 119, increasing, as of November 1, 1955, its company-wide rates for sales of natural gas which were subject to the Commission's jurisdiction; the new schedules were accompanied by supporting data to meet the requirements of the Commission's regulations,

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\* This contract was superseded on November 1, 1955, subsequent to United's filings which are here at issue, by a service-agreement in the standard form provided by the tariff, which was executed on the effective date of United's rate increase.

including a showing of United's cost of service. By order issued October 26, 1955, the Commission, stating that the rate increases had not been shown to be justified and "may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful" (R. 116), found that it was "necessary and proper in the public interest \* \* \* that [it] enter upon a hearing concerning the lawfulness of rates \* \* \*" (R. 116-117). Accordingly, the Commission, as authorized in Section 4 (e) *infra*, p. 119, ordered a public hearing and suspended the new rates, other than those for resale for industrial use only,<sup>10</sup> for the statutory term of five months, i. e., until April 1, 1956 (R. 117).

At various times thereafter, Memphis Light, Gas and Water Division, Mississippi, Texas Gas, and Southern, among others, sought to intervene in the proceedings.<sup>11</sup> In their petitions for intervention, each showed that it purchased substantial quantities of gas directly, or indirectly through another company, from United;<sup>12</sup> the intervention petitions then asserted that

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<sup>10</sup> The new rates for sales for resale for industrial use only were not suspended because of the prohibition in the proviso to Section 4 (e) *infra*, p. 119; and they became effective as of November 1, 1955, as provided in United's filings. The rate increases which were suspended became effective as of April 1, 1956, pursuant to an appropriate motion by United, subject however to refund as provided in Section 4 (e).

<sup>11</sup> The City of Memphis has the power to regulate rates and consequently was entitled to intervene under Section 1.8 of the Commission's Rules of Practice and Procedure by filing a notice of intervention (R. 120-121, 141-142).

<sup>12</sup> The Division alleged that it purchased all its gas requirements for its local distribution system in Memphis and Shelby

the new rates "may be unjust, unreasonable, unduly discriminatory and preferential" so as to place an undue burden upon the intervening petitioner (R. 119), or claimed that its participation in the proceeding would be in the public interest (see R. 130-132, 135). By order issued January 31, 1956, the Commission found that participation of these parties in the proceeding "may be in the public interest" and accordingly permitted them to intervene (R. 141-142).

Hearings concerning the lawfulness of the new rates began on February 6, 1956 (R. 132), and were still in progress when this Court on February 27, 1956, decided the *Mobile* case, *supra*, 350 U. S. 332. Until that time, neither the City, nor the Division, nor Mississippi, had suggested that the Commission lacked authority to accept United's rate schedules for filing; instead, they, together with many of the United's customers, claimed only that the increased rates were unjustified or unreasonable.

Shortly thereafter, on March 22, and 28, 1956, Mississippi, the City, and the Division moved the Commission to reject the new schedules here involved on the ground that they constituted unilateral changes in contract rates which, under the ruling in *Mobile*, could not be accepted by the Commission for filing

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County, Tennessee, from Texas Gas, a substantial, direct purchaser of gas from United (R. 119). Mississippi, according to its petition, makes large volume purchases of gas from United indirectly through Texas Gas and Southern in addition to its direct purchases (R. 131).

under Section 4 (d) (R. 143-148, 162-166).<sup>13</sup> Following the receipt of responses and the hearing of oral argument, the Commission denied these motions in an opinion and order issued on October 2, 1956 (R. 225-237).

In its opinion, the Commission pointed out that, while this Court in *Mobile* had held that a unilateral rate filing must be rejected in the situation there presented—i. e., where a specific contract rate was fixed for a period of years with nothing in the contract indicating directly or by implication that the seller could unilaterally change the rate—the Court had gone on to note that a rate change may be filed under Section 4 (d) if it is “one which the natural gas company has the power to make” (see R. 228-229). The Commission found that the reference in United’s service-agreements to “any effective superseding rate schedules on file with the Federal Power Commission” manifested an intent that the purchasers pay the rates contained in the schedules in effect from time to time, including schedules filed by United under Section 4 (d) (R. 231-232).<sup>14</sup> Accordingly, the Commission concluded that “the filing of United

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<sup>13</sup> In addition, they requested the Commission to prohibit the increased rates from becoming effective as of April 1, 1956, and to require refund of the increased rates for industrial resales.

<sup>14</sup> In their answers to the motion to reject, both Southern and Texas Gas noted their understanding that their service-agreements reserved to United the right to file rate changes with the Commission under Section 4 (d), and at the same time left

and this proceeding relating thereto are wholly consistent with the" holding in *Mobile* (R. 230).

The Court of Appeals reversed and remanded (R. 263-272). Accepting the Commission's finding that, by the phrase "any effective superseding rate schedules", the parties had intended to reserve to United the right to file new schedules under Section 4 (d) (R. 267), the court held that such consent alone was not sufficient to permit new rate filings under that section (R. 267-271). The court declared that, before the seller could make such rate filings, it must, under *Mobile*, also have the purchaser's agreement to the specific amount of the increase. It said (R. 268):

\* \* \* The notice contemplated by Section 4 (d) is notice of the fact that the contracting parties have reformed their contract: that the seller has offered, and the buyer has agreed to, a particular new price to be effective no less than thirty days after the Commission is notified of the change. 350 U. S. at 339-40. It is only at this point—after the parties have negotiated privately a new price term—that the Commission, under Section 4 (d) and (e), in any way becomes involved with the rate changing process. \* \* \*

them free "to oppose any such changed rates in a proceeding before the Commission in respect thereto initiated under Section 4 (e) or 5 (a) of the Act" (R. 168-169; see also R. 171-172, 173-174). Mississippi, the remaining purchaser, did not deny before the Commission that this had been its understanding of its service-agreement (see R. 146, 147, 190-194).

\* \* \* the seller must bring to the Commission a negotiated agreement. And that agreement to the new rate must be as specific in its terms as was the previous contractual agreement to the rate schedule sought to be superseded. \* \* \*

#### SUMMARY OF ARGUMENT

##### I

Petitioner United's changed rates were properly accepted for filing by the Federal Power Commission, and made temporarily effective under the Natural Gas Act. Since United's agreements with its purchasers contemplated just such changes, there was no violation of the Act or of the principles announced by this Court in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332.

A. In rejecting the argument made in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, *supra*, that Section 4 (d) of the Natural Gas Act authorized the filing of new rate schedules without regard to the terms of the original gas sale, this Court ruled that the right of a natural gas company to change its rates for sales made *pursuant to contract* is defined by the terms of the contract, and that Section 4 (d) neither added to nor subtracted from those contractual rights other than by imposing the requirements of notice and filing. The Court recognized that the Act, by preserving private contracts between the gas companies and their purchasers, did not limit the companies' contractual rights to change rates, where such contractual rights existed; it held that the sole function of Section 4 (d) is to enable the Commission to review,

for compliance with the statutory standards, those new rates which a natural gas company may be empowered to file independently of the Act.

In *Mobile*, the rate which the company was seeking to change was a fixed price, incorporated in a contract which contained no provision for rate changes; therefore, established principles of contract law dictated that, in the absence of the purchaser's (*Mobile*'s) consent, United (the seller) had no right to change the rate and hence United's new rate schedule was a nullity. On the other hand, in the instant case, the Commission found (and the court below accepted for the purpose of decision) that the purchasers had agreed in their service-agreements to pay the rates in effect from time to time, as changed by United, and subject to Commission review—the purchasers reserving the right to challenge the reasonableness of the rates before the Commission. These agreements were clearly valid under general contract principles, and the Commission properly concluded that the seller's rate changes were made pursuant to and not in violation of the service-agreements; the changes being "otherwise valid", unlike the new rates in *Mobile* (350 U. S. at 339), were "one[s] the natural gas company has the power to make" (350 U. S. at 342).

The holding of the court below—that despite the purchasers' contrary agreement United's new schedules may not be filed because Section 4 (d) further requires that the purchaser must also agree to the precise level of the new rates—not only squarely contradicts the basic teaching of *Mobile*, but impairs

United's agreements with its purchasers, in the teeth of *Mobile's* recognition that the Act intended to preserve the "integrity of contracts" (350 U. S. at 344).

B. 1. Since the purchasers here had agreed in their service-agreements that United could set rates subject to Commission review, United's new rates may also be viewed as, in effect, making contractually-authorized changes in *ex parte* rates, which *Mobile* recognized could be filed under Section 4 (d) without the purchasers' further consent. Rates filed pursuant to the tariff-and-service-agreement system established by the Commission in its Order No. 144 in 1948 (*supra*, pp. 4-6) are not tailored to individual transactions, but apply generally to all sales by a gas company. The service-agreements now generally employed in pipeline sales do not contain fixed dollars and cent rates, but merely refer to a uniform schedule on file as a part of the pipeline's tariff currently governing that type of sale. Also, the agreement typically contains provisions, as do the present agreements, making it clear that the rate set out in the designated schedule is subject to change by the seller; the service-agreements are separate and distinct from the gas tariff, and contain the parties' agreement on the particular details of that sale, other than price. This system makes it unnecessary for the gas company, in selling gas to a new customer, to negotiate as to price, since the rate is automatically fixed by the applicable schedule then on file. Subsequent rate changes do not amend the service-agreement because they are within the express contemplation of that instrument. Thus, rate making

under this method is as close to an *ex parte* method of rate making as would be practicable in the natural gas industry, where some agreement on terms and duration is required to protect heavy investments by both buyer and seller. As in the pure *ex parte* case, the purchaser is protected against unreasonable rates by the Natural Gas Act which subjects all rate changes to Commission review.

2. That this *ex parte* method is sanctioned by the Gas Act, where not precluded by pre-existing contract rights, is evident from the direct derivation of Section 4 of the Act from comparable provisions of the Interstate Commerce Act expressly contemplating unilateral rate changes. The *Mobile* holding that, despite this derivation, the Gas Act permits contractual rate-fixing means that a fixed contract rate must be respected until set aside by the Commission after a hearing; it does not mean that, in the absence of a fixed contract rate, other methods of setting and changing rates—including the *ex parte* method—are prohibited.

C. 1. The Commission was exercising its proper rate-review function in passing upon United's new schedules; contrary to the view of the court below, the purchasers' freedom to oppose United's new rates did not vest in the Commission an unauthorized arbitration function in scrutinizing the lawfulness of the new rate. The purchasers' intervention in gas rate review proceedings was based upon the Section 15 (a) of the Act, which permits intervention in all Commission proceedings when "in the public interest". Under the

Act, the Commission must review United's new rates to determine their lawfulness and whether they should be permitted to become effective. The Commission does not resolve conflicting private interests in rate review proceedings, as in an arbitration proceeding, but rather discharges its statutory rate-review function. United's service-agreements gave it the right to file new rates and the Commission was merely exercising its statutory authority in reviewing such rates; it was not "arbitrating" a private dispute.

2. The holding below is not aided by respondents' assertion that United's new schedules were mere "proposals"; viewed substantively and realistically under the Act, the filings were filings of actual rates and had the impact and effect of actual rates.

## II

The tariff-and-service-agreement method of rate-making, adopted by the Commission in its Order No. 144 in 1948, protects the interests of both seller and consumers. On the other hand, the system contemplated by the decision below would lead to inequities and injuries.

A. The fear expressed by two judges of the court below (Judges Washington and Bazelon), that sanctioning United's filing of these new rate schedules under Section 4 (d) of the Gas Act would "debilitate" Section 5 (a) by providing the gas companies with a ready means of "avoiding" the "more stringent proof requirements" of that Section (R. 271), is based on a failure to appreciate that the two Sections (Section

4 and 5 (a)) are "simply parts of a single statutory scheme" and that, under both, "[t]he scope and purpose of the Commission's review remain the same—to determine whether the rate fixed by the natural gas company is lawful" (*Mobile*, 350 U. S. at 341). The Commission has consistently applied identical rate standards in proceedings initiated under both Sections: i. e., recovery of actual costs plus a reasonable return. Although the *judicial* test for review of rates set by a regulatory agency contemplates a "zone of reasonableness" within which the administrators may validly act, the Commission does not itself employ that concept. Rates are fixed by the Commission in both Section 4 (e) and 5 (a) proceedings under the same cost-of-service standards, and therefore the administrative just and reasonable rate is not a zone but a pinpoint. Section 5 (a) standards are used in proceedings begun under Section 4 (e), and the danger envisaged by the two judges below does not exist.

B. Conversely, the holding of the Court of Appeals has the effect of virtually deleting the significant suspension-and-refund mechanisms of Section 4 (e) from the Act, so far as the pipelines are concerned. For it limits their use of that Section to situations where all purchasers have agreed to the specific increased rate, a situation which can be expected to occur only infrequently.

C. 1. While the natural gas industry is one of the nation's oldest, gas service was restricted until technological developments led to the first long distance pipelines in the early 1930's. From that time, interstate

pipelines steadily expanded, so that by 1938 when the Natural Gas Act was enacted there were about 6.5 million consumers of natural gas. Termination of active hostilities in 1946 released a tremendous demand for gas, particularly for residential space heating, and pipeline facilities expanded dramatically to meet this demand, serving by 1948 about 11.1 million ultimate consumers, using about 3 trillion cubic feet of gas a year—about  $2\frac{1}{2}$  times the comparable 1938 figure.

Striking as was the pre-1948 expansion, it was dwarfed during the following decade. By 1956, there were 16.1 million residential space heating customers of a total of 25.2 million gas customers using 6.9 trillion cubic feet of gas. As a result of this explosive growth, the natural gas industry today is the sixth largest in the nation and a great interstate network of pipelines now bring gas to nearly all parts of the country. Natural gas has fostered the growth of new industries in many communities, aided post-World War II residential housing construction, and has made substantial contributions to the growth and health of the construction and steel industries.

2. A critical factor in this tremendous expansion has been the pipelines' ability to adjust rates to meet increasing costs. A major pipeline must make heavy investments in facilities, and reasonable assurances of adequate net revenues over the long life of the project is important, in order to obtain the loans required to finance such facilities. Fixed-price contracts applied to all of the pipelines' sales would not assure

such revenues, in the light of rising costs and unforeseen contingencies. In order to charge rates covering only current costs, and to give these assurances to the lending institutions, pipelines sales contracts have provided for rate adjustments generally concurrent with cost increases. For this purpose, prior to the conversion to the tariff-and-service-agreement system, the pipelines utilized various escalation clauses. Order No. 144, issued by the Commission in 1948, prohibited such escalation provisions; instead, the Commission authorized the pipelines to reserve in their service-agreements a right to file rate changes, subject to Commission review. This right, under which pipelines have since 1948 filed rate changes under Section 4 (d) to keep pace with sharply increasing costs without prior purchaser assent, has enabled them to put the new rates temporarily into effect (subject to refund) and thus to facilitate the necessary financing for the tremendous expansion in service, and at the same time to carry on during the period of Commission review.

3. The ultimate consumers have benefited from the vastly expanded service now available and have had protection against excessive prices. Not only are cost-of-service standards applied to new rates filed under Section 4 (d), but the Commission scrutinizes each such filing to assure compliance with this standard and, in practice, enters upon a hearing in virtually all cases, in which it has liberally permitted intervention by purchasers, both direct and indirect, as full parties. Such a thorough investigation has been possible only because the Commission, by its refund power

under Section 4 (e), can adjust rates retroactively, thereby protecting all interests, consumer and investor, during the pendency of the investigation.

While Section 4 (e) prohibits the suspension of new rates for sales for industrial resales, respondents' argument based on this fact ignores both (1) that industrial rates are nonsuspendible only if set out in separate schedules, and such sales are only a small percentage of the total; and (2) that Congress has retained the provision although the Commission has repeatedly recommended its repeal. Similarly, the claim that present procedures destroy the pipelines' incentive to resist producer increases disregards the fact that producer rates are themselves subject to Commission regulation, and that purchasers, indirect as well as direct, may also intervene in the review proceedings incident thereto. And the fact (stressed by respondents) that rates in effect during a Section 4 (e) proceeding are only tentative, subject to refund, does not destroy but enhances the utility of the procedure. Although judicial stays pending review of a Commission rate order present similar problems, the courts have almost uniformly exercised discretion to grant such stays, recognizing that it is the best available means of protecting all interests.

4. None of the suggested alternatives achieves the necessary accommodation of all interests. Reversion to individually-negotiated contracts, with various types of escalation clauses, would make it virtually impossible for the Commission to control undue preferences and discrimination. Nor is individual negotiation among the parties the answer to the problem. Despite

Commission encouragement of settlements, the parties have been unable to agree on all issues in many rate cases, and rate agreements are usually reached only after Commission hearings. Moreover, reliance on negotiation is practical only if economic pressures on all parties are roughly equal, which is certainly not always the case.

Similarly unsatisfactory for this purpose are proceedings instituted under Section 5 (a), because of (1) the considerable time needed to complete the necessary careful investigation into costs, and (2) the wholly prospective nature of the new rate (the suspension-and-refund mechanism of Section 4 (e) being unavailable). The hearing time could be cut only with the cooperation of all parties which, because of differing economic incentives, cannot be relied upon. Moreover, exclusive reliance on Section 5 (a) proceedings would subject the Commission to strong pressure to fix rates based on estimates, rather than actual costs, thus encouraging inflated rates contrary to the consumers' interests.

### III

Respondents' alternative argument (not decided below)—that the service-agreements did not themselves authorize United to file new rates under Section 4 (d)—is contradicted by the Commission's findings which are reasonable and supported by substantial evidence.

A. The language of the pricing provision of the agreements incorporates the current schedule and *any effective superseding* rate schedules, and so includes, in terms, Section 4 (d) filings, for under our

interpretation of the Act (and the *Mobile* case) such filings are fully "effective." In addition, the pricing provision closely adheres to the language and format of Commission Order No. 144, which clearly provides for such a reservation.

B. The Commission's reading of the service-agreements is supported by the uniform interpretation given it, following *Mobile*, by virtually every segment of the industry, including the parties to United's agreements.

#### ARGUMENT

##### I

UNITED'S CHANGED RATES WERE PROPERLY ACCEPTED FOR FILING BY THE FEDERAL POWER COMMISSION, AND MADE TEMPORARILY EFFECTIVE UNDER THE NATURAL GAS ACT AS INTERPRETED IN THE MOBILE DECISION

The decision below is based squarely and solely on the Court of Appeals' understanding of this Court's recent decision in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332. Accepting (at least for the purposes of its ruling) the Commission's

finding that United's purchasers had agreed in the service-agreements that United could file effective rate changes such as those involved here (R. 267),<sup>15</sup> the court held that nevertheless a changed gas rate filed by United under Section 4 (d) of the Gas Act must—under the Act as interpreted in *Mobile*—be based on a new negotiated price agreement between seller and purchaser, even though the parties had previously agreed otherwise; no other filing could be validly accepted by the Commission or could become effective. We believe that this holding is wholly incompatible with *Mobile's* major premise that under the Gas Act rate-setting is in the first instance for the selling gas companies—subject to the double check of such freely-made agreements as they may make, and of subsequent rate review by the Commission.

**A. *MOBILE* DOES NOT REQUIRE THE SELLER TO OBTAIN PURCHASER ASSENT TO CHANGED RATES WHERE THE SALES AGREEMENT, AS HERE, AUTHORIZES THE SELLER TO ESTABLISH AND CHANGE ITS RATES FROM TIME TO TIME, SUBJECT TO COMMISSION REVIEW**

The fundamental principles of the *Mobile* decision are that the Natural Gas Act does not affect the making of contracts between a natural gas company and its purchasers; the Act leaves unimpaired the contractual rights of the parties, which continue to be governed by the general law; Section 4 (d) merely conditions the effectiveness of otherwise valid rate changes upon compliance with the statutory notice and

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<sup>15</sup> We discuss in Point III, *infra*, pp. 100-115, respondents' contention that the Commission erred in this finding.

filing requirements, and thus gives an opportunity to the Commission to review the changes in the public interest. Although the Court concluded, applying these principles, that the rate increase in *Mobile* was invalid because that particular contract specifically provided a lower price, and did not contemplate or provide for unilateral changes by the seller, the opinion recognized that new schedules may be filed under Section 4 (d) if sanctioned by the seller's contracts with its purchasers. The provision in the service-agreements in this case of a right to file new schedules (without specific customer assent to the change) renders United's rate changes valid under *Mobile* and refutes the conclusion below that the present situation is, for all practical purposes, "a close copy of *Mobile*" (R. 266)."

1. *The Mobile decision*.—The special contract involved in *Mobile* incorporated a single rate governing its entire period and contained no provision for the filing of rate increases by the seller (United). Although *Mobile* purchased gas generally for resale from United, this particular contract related only to a

" Since this Court's decisions in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332, and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U. S. 348, the Commission has uniformly honored pre-existing price contracts, it has accepted no rate filings under Section 4 (d) of the Act which violated such contracts, and it has applied the standard of the public interest in reviewing existing price contracts under Section 5 (a). See the Commission's Opinion No. 308, *El Paso Natural Gas Company*, 19 F. P. C. 154 (issued January 24, 1958) (Reply Memorandum for the Commission (on the petition for certiorari), App. p. 9a).

specific resale by Mobile to Ideal Cement Company. Ideal had planned to construct a new cement plant in the City of Mobile if it could be assured a supply of gas at a sufficiently low rate. Before making an agreement with Ideal, Mobile negotiated a special contract with United in which United agreed to sell gas for 10 years to Mobile, for the Ideal resale, at a rate equivalent to 10.7¢ per Mcf, a rate substantially lower than that for other gas furnished by United to Mobile. This contract enabled Mobile to agree to furnish gas to Ideal for the same 10 year period at 12¢ per Mcf. Subsequently, while the contract was still outstanding, United undertook to increase its rates for a number of sales to various customers, including Mobile, by filing new schedules under Section 4 (d) of the Gas Act (Nos. 17, 31, Oct. Term, 1955, R. 3, 15, 34). Among these new schedules for the sales to Mobile was an increased rate for the resale to Ideal. Accepting the propriety of the new schedules with respect to its other purchases from United, Mobile objected to the new rates for the Ideal resale on the ground that the change effected "a unilateral increase in existing rates for natural gas fixed by a firm contract between United and Mobile \* \* \*" (Nos. 17, 31, Oct. Term, 1955, R. 8). See also *infra* pp. 113-115.

The basic argument advanced in *Mobile* to support the Commission's acceptance of the new rate schedule for the Ideal resale was that Section 4 (d) granted to United the right unilaterally to file new rates *without any regard to the terms of the original contract* or to Mobile's failure to assent to the new rate, subject, of course, to Commission review under Section

4 (e). . In rejecting this claim that Section 4 (d) vested in the seller, *vis a vis* the purchaser, rights over and above those set out in their contract and that Section 4 (d) in effect authorized United to annul its contract with Mobile, the Court first held that the Natural Gas Act does not abrogate private contracts. On the contrary, the Court ruled, "the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public" (350 U. S. at 339).

In accordance with this reading of the Act, the Court went on to conclude that Section 4 (d) added nothing to a natural gas company's power to change its rates (350 U. S. at 339-340):

On its face, however, § 4 (d) is simply a prohibition, not a grant of power. It does not purport to say what is effective to change a contract, any more than § 4 (c) purports to define what constitutes a "contract" that may be filed with the Commission. The section says only that a change *cannot* be made without the proper notice to the Commission; it does not say under what circumstances a change *can* be made. Absent the Act, a unilateral announcement of a change to a contract would of course be a nullity, and we find no basis in the language of § 4 (d) for inferring that the mere imposition of a filing-and-notice requirement was intended to make effective action which would otherwise be of no effect at all. In

short, § 4 (d) on its face indicates no more than that otherwise valid changes cannot be put into effect without giving the required notice to the Commission. To find in the section a further purpose to empower natural gas companies to change their contracts unilaterally requires reading into it language that is neither there nor reasonably to be implied. [Italics in the original.]

This excerpt, which contains the dispositive ruling of the Court," falls far short of supporting the statement of the court below in this case—for which it is cited—that (R. 268):

\* \* \* The notice contemplated by Section 4 (d) is notice of the fact that the contracting parties have reformed their contract; that the seller has offered, and the buyer has agreed to, a particular new price to be effective no less than thirty days after the Commission is notified of the change. 350 U. S. at 339-340. \* \* \*

Although the Court of Appeals thus held that the parties must arrive at a specific new price agreement before the seller may change its rates, this Court actually ruled in *Mobile* that the right of a natural gas company to change its rates when the sale was made pursuant to a contract is limited only by the terms of the original contract. In other words, it is the contract between the gas company and its purchaser, not Section 4 (d), which defines the company's right to change rates by filing new schedules under that Sec-

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"In the remainder of the opinion (350 U. S. at 340 ff.), the Court explained why it could not accept the further contentions advanced by the then petitioners in support of their position.

tion. This is plain from the Court's express statements (quoted above, p. 27) :

\* \* \* It [§ 4 (d)] does not purport to say what is effective to change a contract, any more than § 4 (c) purports to define what constitutes a "contract" that may be filed with the Commission \* \* \*. Absent the Act, a unilateral announcement of a change to a contract would of course be a nullity, and we find no basis in the language of § 4 (d) for inferring that the mere imposition of a filing-and-notice requirement was intended to make effective action which would otherwise be of no effect at all [350 U. S. at 339-340].

Any doubt that the Court was *not* ruling that Section 4 (d) placed restrictions (other than the provision for giving notice by filing new schedules) upon the effectiveness of new rates is dissipated by the further comments (also quoted above, pp. 27-28) that .

\* \* \* § 4 (d) is simply a prohibition, not a grant of power. \* \* \* The section says only that a change *cannot* be made without the proper notice to the Commission; it does not say under what circumstances a change *can* be made. \* \* \*

\* \* \* § 4 (d) on its face indicates no more than that otherwise valid changes cannot be put into effect without giving the required notice to the Commission. \* \* \* [350 U. S. at 339-340.]

Under this reading of the Gas Act, a gas company is in the same position, with regard to changing rates, as it was before the passage of the Act, with the significant exception that its rate changes are now subject to Commission review. The Court recognized

his in numerous additional statements throughout the *Mobile* opinion:

\*\*\* The Act merely defines the review powers of the Commission and imposes such duties on natural gas companies as are necessary to effectuate those powers; it purports neither to grant nor to define the initial rate-setting powers of natural gas companies [350 U. S. at 341].

\*\*\* If the purported change is one the natural gas company has the power to make, the "change" is completed upon compliance with the notice requirement and the new rate has the same force as any other rate—it can be set aside only upon being found unlawful by the Commission [*id* at 342].

\*\*\* In short, the Act provides no "procedure" either for making or changing rates; it provides only for *notice* to the Commission of the rates established by natural gas companies and for *review* by the Commission of those rates. The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act [*id* at 343]. [*Italics in the original.*]

All of the relevant provisions of the Act can thus be fully explained as simply defining and implementing the powers of the Commission to review rates set initially by natural gas companies. Admittedly, the Act presumes a capacity in natural gas companies to make rates and contracts and to change them from time to time,

but nowhere in the Act is either power defined. The obvious implication is that, except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act: to establish *ex parte*, and change at will, the rates offered to prospective customers; or to fix by contract, and change by mutual agreement, the rate agreed upon with a particular customer [*ibid.*].<sup>22</sup>

These statements conclusively demonstrate the fundamental teaching of *Mobile* to be that the Natural Gas Act, in preserving private contracts between the natural gas companies and their purchasers, did *not* limit the companies' contractual rights to change rates. Hence, if a gas company has the power (either by contract or otherwise) to change its rates, that right is unaffected by the Act and continues in full force and effect; the gas company, accordingly, can properly change its rates by meeting the filing requirements of Section 4 (d). However, if the gas company has no such right apart from the Natural Gas Act, the Act did not bestow that right upon it, and it is without power to change its rates except with the agreement or acquiescence of its purchasers; where (as in *Mobile* itself) there is a price agreement without any provision authorizing a rate change, new schedules filed under Section 4 (d) would be a nul-

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<sup>22</sup> There is nothing in the remainder of the Court's opinion which, when read in context, is inconsistent with these statements. See, also, *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U. S. 348, the companion case.

lity, absent the consent of the purchaser." The sole function of the notice-and-filing requirement of Section 4 (d) is to enable the Commission to review, for compliance with the statutory standards, those new rates which a natural gas company may be empowered to file on the basis of authorization independent of the Act.

2. *The application of Mobile to the present case:—*

(a). The Commission construed *Mobile* as holding, in accordance with the analysis just set out (*supra*, pp. 25-32), that the rights of a natural gas company to change rates were the same under the Natural Gas Act as they would have been if there had not been any Act. As it stated in its opinion (R. 230):

Our concern, therefore, is with the service agreements (contracts) between United and its customers as in effect at that date [September

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"Since " \* \* there is nothing in the structure or purpose of the Act from which we can infer the right, not otherwise possessed and nowhere expressly given by the Act, of natural gas companies unilaterally to change their contracts" (350 U. S. at 343-344), it was necessary for the Court to look beyond the Act to ascertain whether United had a right to change the rate for the Mobile-Ideal resale. And since the rate which United was seeking to change by a filing under Section 4 (d) was incorporated in a fixed-price contract, which contained no provision for rate changes, "United was bound by obligations of the contract" (R. 229) "unless the purchaser consented to a change in the rate." In view of Mobile's failure to agree to the new rate, the Court applied established principles of contract law to conclude that United had no right to file a new rate for the Ideal resale, and that (350 U. S. at 347):

\* \* \* it follows that the new schedule filed by United was a nullity insofar as it purported to change the rate set by its contract with Mobile and that the contract rate remained the only lawful rate.

30, 1955, the date United filed the new rate schedules] and whether thereunder United had the "power to make" the change in rates.

The Commission then proceeded to examine the pricing provisions in United's service-agreements with its customers, their background and history, and it found that "the understanding and intent of the contracting parties [was] that changes could properly be made by United in the rates contained in the applicable rate schedules in effect at the time of execution of the service agreement \* \* \* that the purchaser would pay the rates set out in the applicable rate schedules effective from time to time and that changes could be made therein by United under the procedures established under section 4 of the Act" (R. 231). On that view, the Commission concluded that "United's proposal for increased rates in this proceeding does not constitute a prohibited unilateral change of a contract, for the contract language supplies the purchaser's assent to United's filing of a change in rates" (R. 236-237). As already noted (*supra*, p. 12, 23-24), the court below did not question the Commission's finding as to the intent and purpose of the pricing provision in the service-agreements, at least for its decision in this case.<sup>20</sup> See, also, *infra* pp. 100-115.

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<sup>20</sup> At the oral argument, held on December 6, 1957, in *Willmut Gas and Oil Company v. Federal Power Commission*, C. A. D. C. No. 13,683, which arises out of the same Commission proceedings as the instant case and presents the same issue, counsel for that petitioner in effect urged the panel of the court, composed of the same judges who decided the present case, to amend their opinion here to reject the Commission's construction of the service-agreements. The court's *per curiam*

Although the Commission held that United's changes had been properly filed, it also recognized—since new rates filed under Section 4 (d) may be set for a hearing on reasonableness (pursuant to Section 4 (e) and Section 5 (a)) without regard to the parties' private agreement—that under the service-agreements the purchasers had not waived whatever rights they had under Section 15 (a) of the Act, *infra*, p. 121, to seek to intervene in such a proceeding and to oppose the new rates as not complying with the statutory standards. Such intervention was allowed, and the rate proceeding was continuing when respondents moved to have United's filings stricken (*supra*, p. 10). (As pointed out in the Statement (*supra*, pp. 8-9), the Commission had suspended the changes (except those for industrial resale) for the statutory period of five months, and at the end of that time the rates had gone into effect subject to refund by United as provided in Section 4 (e) of the Act.)

(b). The court below apparently thought that, since the purchasers were free to intervene in opposition to the increase, their consent, as found by the Commission, was limited to "the act of filing" (italics in the original) new rate schedules (R. 267). Consent limited to the act of filing new rates without agreement as to the level of the new rates, the court held, was insufficient to authorize the Commission to accept

opinion in *Willmut*, issued on December 26, 1957, set aside the Commission's order on the authority of its decision in the present case, stating that "Additional contentions made by the petitioner [*Willmut*] need not be reached." (251 F. 2d 381, 382 (C. A. D. C.)). Certiorari has not been sought in *Willmut*, since the court stayed its issuance of a certified copy of its opinion (in lieu of mandate) pending decision by this Court in the instant case.

United's new schedules under Section 4 (d) (R. 269).

The fact is, however, that the buyers had agreed not only to the "act of filing" but to the initiation of a rate change, although not to any specified figure. By requiring customer consent not only to the act of filing but also to the specified new rate, the lower court has failed to recognize that the act of filing an "otherwise valid" rate under Section 4 (d) initiates a new rate which the Commission may either allow to become effective at the end of the notice period or suspend for future investigation. Under a *Mobile* type of specified-rate contract, a purchaser consents both to the precise new rate, and to the act of filing, in order that the new rate may be placed in effect. In holding that a customer purchasing gas under a service-agreement—which itself contains no rate, but refers to a rate schedule or superseding rate schedule—must consent to the specified new rate in the new rate schedule, as well as to the act of filing, the lower court has revised the agreement between the parties and given no effect to the act of filing. For mere consent to the "act of filing" would have no meaning unless the filing set in motion the rate change provisions of Section 4 (d) of the Act under which the Commission can determine whether to suspend a change or permit it to become effective.<sup>21</sup>

The purchasers' agreement here, moreover, was not merely or even primarily to the "act of filing." Rather, they had contracted to pay any rate on file with the Commission, including rate changes made under Section 4 (d) which the Commission permits to become effective in accordance with

<sup>21</sup> See *supra*, p. 32; *infra*, pp. 62-63.

the Act", and this agreement to pay any effective rate was not conditioned upon the purchasers' assent to a specified rate. Since there is no question that such an agreement is valid and binding under the general principles of contract law," the rate changes made by United, being permitted by its contracts with its purchasers, were, as the Commission held (R. 228-229), "one[s] the natural gas company has the power to make." Hence, the rates were changed by United pursuant to, and not in violation of, the service-agreements; and their validity was not dependent upon any authorization assertedly derived from Section 4 (d) or any other provision of the Act. The new rates were "otherwise valid" (350 U. S. at 339) and *Mobile* presented no obstacles to United's filing of the new schedules under Section 4 (d).

(c). In these circumstances, the holding by the court below that the purchasers' consent to the specific new rates was also required before the new schedules could be filed under Section 4 (d) is more than

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"Intervention in a proceeding instituted under Section 4 (e) and opposition to the new rate as not being just and reasonable do not in any way militate against the existence of an agreement to pay the rate as finally allowed by the Commission. See, also, *infra*, pp. 49-52, 100-110.

"See, e. g., *Cities Service Gas Producing Co. v. Federal Power Commission*, 233 F. 2d 726 (C. A. 10), certiorari denied, 353 U. S. 911; *Col-Tex Refining Co. v. Coffield & Guthrie, Inc.*, 198 F. 2d 788 (C. A. 5); *Pfotzer v. United States*, 176 F. 2d 675 (C. A. 4); *Shamrock Oil & Gas Corp. v. Coffee*, 140 F. 2d 409 (C. A. 5); *Buggs v. Ford Motor Company*, 113 F. 2d 618 (C. A. 7), certiorari denied, 311 U. S. 688; *Ken-Rad Corporation v. R. C. Bohannon, Inc.*, 80 F. 2d 251 (C. A. 6).

an unwarranted extension of *Mobile*; it amounts to a square contradiction of the basic holding of the case that the validity of rate changes under that Section is governed solely by the arrangements, contractual or otherwise, between the parties, since the Act imposes no conditions upon the effectiveness or validity of rate changes other than those of notice and filing with the Commission. *Mobile* does not require, as the court below apparently believed, that all gas rates be set by negotiated contracts or that the seller make no change in the prior rate even when its purchasers have agreed that it may do so. Gas companies are free under *Mobile* to contract for fixed prices which may not be breached by filing superseding rates under Section 4 (d), but they are also free under *Mobile* to agree that the seller may in the first instance change the prior rate, subject to the Commission's statutory power of review which does not depend upon private agreement. Since the very foundations of *Mobile* are that the parties are free to contract for the sale of gas, subject to Commission review, and that Section 4 (d) does not prescribe conditions for changing rates other than notice and filing, the imposition by the court below of the further condition of purchaser-consent to the specific rate, over and above the requirements of the service-agreement, flies in the face of that decision.

Not only is this insistence by the Court of Appeals upon the purchasers' assent to the specific rate, even though foreign to the service-agreements, at odds with the basic ruling in *Mobile*, but it also impairs United's agreements with its purchasers, contrary to this

Court's express recognition in *Mobile* that the result there reached preserves "the integrity of contracts" (350 U. S. at 344). For the additional requirement imposed below operates in effect to delete from the service-agreement the right given to United to make rate changes, and effectively converts the service-agreement, which contemplated changeable rates throughout its term, into one with a fixed-rate for the entire contract period, subject to change (absent the purchasers' consent to the new rates) only pursuant to and at the end of a proceeding instituted by the Commission under Section 5 (a). Such a court-imposed modification of the service-agreements destroys, rather than preserves, their integrity."

"In the court below, respondents argued that the instant case is indistinguishable from *Mobile* on its facts. According to respondents, at the time the *Mobile* contract was entered into, the Commission and the natural gas industry shared the view that a pipeline company could file new rates under Section 4 (d) even though no right to do so was given by its contracts with its purchasers; hence, respondents urged, there was, in *Mobile*, in addition to the asserted statutory right to change, an implied agreement (comparable to the express understanding here involved) that United had the right to change the contract rates by filing new schedules under Section 4 (d). The short answer to this argument, even assuming that such a contractual right might have been implied in *Mobile* despite its absence from the written contract, is that the argument was neither advanced in support of the propriety of United's rate filing nor passed upon by this Court. That issue formed no part of the Court's ruling in that case. An additional answer is that, while the Commission construed Section 4 (d) as authorizing a gas company to change contract rates without the purchasers' assent, the industry was not unanimous in agreeing with this construction of the Act (see Appendix B, *infra*, pp. 129-132), and in such circumstances there could have been no implied agreement in *Mobile*, as now suggested by respondents.

B. UNITED'S NEW SCHEDULES MADE CONTRACTUALLY AUTHORIZED  
CHANGES IN *EX PARTE* RATES

Another valid way of looking at the present case is to view the setting and changing of rates under the service-agreement-and-tariff system as the establishing and modifying of rates *ex parte*. Setting and changing rates *ex parte*, subject to Commission review, is recognized by the *Mobile* decision and authorized by the Natural Gas Act.

1. *United's new schedules changed ex parte rates under the tariff-and-service-agreement system.* In *Mobile*, the Court recognized that, where the original rate had been established *ex parte*, the gas company might validly file rate changes under Section 4 (d) without specific consent by the purchaser to the new rates. See 350 U. S. at 343. Examination of the tariff-and-service-agreement system of rate making, under which United filed its new schedules and which was prescribed by the Commission's Order No. 144, *supra*, p. 4; *infra*, pp. 73-76, and agreed to by all parties to this proceeding, reveals that it provides for rate changes which are virtually, if not entirely, *ex parte* changes. In this light, it follows that where such a tariff-and-service-agreement system has been accepted rate changes may properly be filed under Section 4 (d) without the assent of the purchasers to the precise amount of the new rates.

As already indicated, *supra*, pp. 25-26, although *Mobile* was a general purchaser from United of gas which it resold in local distribution and the new rates there involved increased its cost of purchased gas gen-

erally, Mobile in the *Mobile* case objected only to the change in rate for gas purchased under what it characterized as "a special and unique contract" (Nos. 17, 31, Oct. Term, 1955, R. 35) providing a concededly low fixed-rate designed to meet the needs of the Ideal Cement Company as a prerequisite to locating its plant in that city." In sharp contrast, rates under a tariff- and service-agreement system are not tailored for special or individual transactions; rather, ~~each rate schedule~~ applies generally to all sales by a gas company to a particular class of customers or for a particular type of service. Section 154.11 of Order No. 144 (18 C. F. R. 154.11), *infra*, p. 122, defines a rate schedule as generally including "a statement of a rate or charge for a particular classification of transportation or sale of natural gas subject to the jurisdiction of the Commission \* \* \*"; and Section 154.34 of the Order (18 C. F. R. 154.34), *infra*, pp. 123-124, prescribing the composition of a tariff, provides in part:

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(b) Rate schedules shall be grouped according to class and numbered serially within each group, using a letter before the serial number to indicate the class of service. For example, G-1, G-2 may be used for general serv-

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" The Mobile-Ideal contract continued in effect under Order No. 144 because, while the original percentage rate was restated in dollars and cents, Mobile had not executed a service-agreement as to this purchase. See Section 154.85 of Order No. 144 (18 C. F. R. 154.85), *infra*, p. 127; *Mobile Gas Service Corp. v. Federal Power Commission*, 215 F. 2d 883, 891 (C. A. 3), affirmed, 350 U. S. 332.

ice; CD-1, CD-2 for contract demand service; I-1, I-2 for interruptible service; T-1, T-2 for transmission service; X-1, X-2 for schedules for which special exception has been obtained.

Thus, each rate schedule applies on a company-wide or zone basis, and all purchasers falling within the class covered by a specific schedule pay the same rate, i. e., the rate set out in the schedule for that class of service. This is true whether the purchaser has been buying gas from the gas company for several years or came onto the company's lines only yesterday.

In further contrast to the *Mobile* contract, which (as subsequently restated) contained a fixed dollars-and-cents rate for the Ideal resale, service-agreements executed in accordance with Order No. 144 do not contain any such specific rate. On the contrary, as required by Section 154.40 of the Order (18 C. F. R. 154.40), *infra*, p. 125, the service-agreements merely refer to the letter designation of the tariff sheet or sheets currently governing sales of the class or type covered by the service-agreement. The agreement identifies only the tariff rate pertaining to the general class of sales, without stating a fixed price. In fact, the executed service-agreements embodying the contract between the parties are separate and distinct from the rate schedules, which determine the rate to be paid for the sale made under that agreement. While Section 154.34 of Order No. 144 (18 C. F. R. 154.34), *infra*, pp. 123-124, requires that the tariff include the *form* of service-agreement which the gas company intends to make with its purchasers, the service-agree-

ment actually executed by each purchaser is independent and apart from the tariff. See, also, Sections 154.14, 154.40; 18 C. F. R. 154.14, 154.40, *infra*, pp. 123, 125.

Moreover, not only is there no fixed price set out in the service-agreements, but the executed agreements in this case provide—as permitted by a proviso in Section 154.38 (d) (3) of the Order (18 C. F. R. 154.38 (d) (3)) *infra*, pp. 73-76, 124—that the purchasers are to pay in accordance with either the rate schedule specifically designated “or any effective *super-seding* rate schedules on file with the Federal Power Commission.”\* (Emphasis added.) The agreements thus establish, as the Commission found (R. 231-232, *supra*, pp. 11, 33), that the rate contained in the specifically designated schedules may from time to time be superseded by new rates filed by the seller and that the purchaser’s obligation to pay is not limited to the rate set in the specifically designated schedule on file, but also extends to any effective superseding rate schedules. In this way, the service-agreements clearly indicated that the rate contained in the specifically designated schedule was subject to change and hence might not continue in effect throughout the term of the agreement. See, also, *infra*, pp. 100-115.

As a result of this service-agreement-and-tariff system, when a gas company undertakes to sell gas to a

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\* As indicated *infra*, pp. 110-111, the pricing provisions of service-agreements are not all formulated in the same language. However, their intent is basically the same in the respect that virtually all the form service-agreements used by the pipeline companies contemplate the changing of rates by the selling pipeline company.

new customer, the parties no longer need to agree upon an individual price for that sale, and then file a contract embodying that price with the Commission which is binding upon them until renegotiated or set aside by the Commission in a Section 5 (a) proceeding. Instead, while they negotiate as to the various other aspects of the sale," the current rate to be charged is fixed by the applicable schedule then on file with the Commission for the class of customer or type of service, and is referred to in the service-agreement between the parties. Subsequent rate changes made by the gas company by filing new schedules under Section 4 (d) do not alter or amend these service-agreements which explicitly contemplate such rate changes by the incorporation of rates in effect from time to time, not merely the rate in effect when the agreement is entered into. By the same token, revisions in the service-agreement cannot modify the rate governing the parties' sale, since that can be changed only by revising the rate schedule and thereby simultaneously revising the rate for all similarly situated sales.

In view of these facts—(1) that the rate paid by each purchaser is governed by a rate schedule applicable to all purchasers in the same class or receiving

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" To the extent that the sales involve details peculiar to each customer, the function of a service-agreement is to embody the parties' agreement as to such matters as the "service to be rendered, area to be served, maximum obligation to deliver, delivery points, delivery pressure, \* \* \* effective date and term, \* \* \*". Section 154.40 of Order No. 144, 18 C. F. R. 154.40 *infra*, p. 125.

the same type of service, and (2) that the service-agreements, which constitute the purchasers' rate contracts with the gas company, are separate from the rate schedule, do not fix a rate, and are not amended by any change in rate—the rate situation under the tariff-and-service-agreement method is closely analogous to, if not the same as, the purely *ex parte* system in which the original rate is established without agreement. Indeed, it is about as close to an *ex parte* method of rate-making as would be practicable in the natural gas industry, where in most cases both seller and purchaser require an agreement as to the duration and other conditions of the sale in order to protect heavy investments in facilities (see *infra*, pp. 72–75). Hence, under this type of agreement, as the Court recognized in *Mobile* with respect to *ex parte* rates (350 U. S. at 343), rates may be changed by the gas company without any further consent or agreement of the purchasers. It follows that United's changing of rates by filing new schedules under Section 4 (d) was properly accepted by the Commission, even though the purchasers had not agreed to the amount of the new rates.

2. *Ex parte* rate-making is sanctioned by the Natural Gas Act. It may be helpful to spell out the support for this Court's recognition in *Mobile* that the Natural Gas Act authorizes the making and changing of *ex parte* rates, since the court below seems to hold that *ex parte* rate-making is outlawed by the Act.

(a). Sections 4 and 5 (a) of the Natural Gas Act are based directly on Sections 6 (1), 6 (3), 15 (1), and 15 (7) of Part I of the Interstate Commerce Act

dealing with railroad rates."<sup>23</sup> *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 584; *Hope Natural Gas Co. v. Federal Power Commission*, 196 F. 2d 803, 806-807 (C. A. 4). The procedures provided by Part I of the Commerce Act relating to initial rate filings, filing of changed rates, suspension, and hearings as to lawfulness are, insofar as here pertinent, identical with those of the Gas Act, with the one exception that Section 4 (c) of the Gas Act also requires the filing of contracts "which in any manner affect or relate to such [filed] rates".<sup>24</sup>

In *Mobile*, the Commission argued that the conceded derivation of Sections 4 and 5 (a) of the Gas Act

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<sup>23</sup> For the Court's convenience, the parallel rate review provisions of the Commerce and the Gas Acts are set forth in Appendix C, *infra*, pp. 133-138.

<sup>24</sup> Under Part I of the Commerce Act, the Commerce Commission requires filing of formal tariffs containing dollars and cents statements of rates generally applicable to all shippers (49 C. F. R. 141.1, 187.28). Under its regulations, carriers change their rates by filing an amendment to their tariffs, which is subject to suspension, and may be placed in effect under bond, following a procedure virtually identical to that found in the Gas Act.

The Power Commission regulations similarly require gas pipelines, unless exempted by the Commission, to file tariffs containing dollars and cents rates generally applicable to the transportation and sale of gas to all customers (18 C. F. R. 154.38), *infra*, p. 124. As noted, *supra*, pp. 41-42, the tariffs include blank forms of service-agreement employed by the sellers in making sales under the tariff, but not the actual agreements, which are not part of the tariff, but must be filed by the seller as entered into (18 C. F. R. 154.40). *Infra*, p. 125. A gas rate schedule must be supported by a statement showing the "basis used in arriving at the proposed rate or charge" and whether the rate results from "negotiation, cost of service determination, competitive factors, or others" (18 C. F. R. 154.62 (b) (3)), *infra*, p. 126.

from Part I of the Commerce Act demonstrated that Congress intended in the Gas Act, as in the Commerce Act, to permit abrogation of pre-existing fixed contract rates by the unilateral filing of new gas rate schedules in accordance with Section 4. Rejecting this contention, the Court noted that the Commerce Act made unlawful any special rail rate which conflicts with a uniform railroad tariff, and also prohibited filing of individual contracts as rate schedules. The Court pointed out that the Gas Act, in contrast, did not automatically outlaw separate contract rates (although such rates may be found unreasonable or discriminatory, and hence unlawful), but unlike the Commerce Act provided for filing of contracts "which in any manner affect or relate to such [filed] rates". The Court concluded that the Gas Act did not expressly provide for the abrogation of pre-existing contracts, and, in the absence of an express legislative prohibition, the parties' common law rights were preserved. See *supra* pp. 27-32. In so holding, the Court stated that the "Gas Act *permits* the relations between the parties to be established initially by contract" (350 U. S. at 339; *emphasis added*).

It is a far cry from this conclusion to the apparent holding of the court below that a gas company can never change its rates under Section 4 except with the consent of the purchaser to the changed rate. As we have repeatedly stressed, in *Mobile* the basic issue was whether rate contracts survived the enactment of the Natural Gas Act; and the Court's ruling that they did cannot be converted into a sweeping holding that all gas rates *must* be set by bilateral agreement.

The very fact that Congress incorporated the Commerce Act's rate provisions into the Gas Act demonstrates the Congressional will that the rate making methods of the Commerce Act would be generally applicable under the Gas Act, in the absence of contract rates. The additional provisions for the filing of rate contracts in Section 4 of the Gas Act merely evidenced Congressional awareness that in the gas field, unlike the railroad or motor common carrier fields, there was a need that special contractual arrangements be recognized. Aside from saving contract rights, Congress intended to permit the *ex parte* changing of rates under the Gas Act.

(b). That Congress did not intend to permit rate changes to be made *only* by bilateral agreement is also manifested in other ways. Section 4 (c) of the Act, *infra*, p. 118, provides that "all rates and charges" must be filed with the Commission and says nothing as to how such rates or charges are to be arrived at. Section 4 (d), *infra*, p. 119, states that changes in "any such rate, charge \* \* \*" can be made only after thirty days' notice to the Commission and the public, to be given by filing new rate schedules reflecting the changes. Section 4 (d) thus provides for the filing of changes not only in "contracts" but also in "rates" and "charges". This provision for changes in "rates" and "charges"—noncontractual terms—demonstrates the Congressional understanding that rate changes would and could be made under Section 4 (d) without the purchasers' assent. Under Section 4 (e), *infra*, p. 119, the Com-

mission is empowered to review the lawfulness of "any such new schedule", i. e., *any* schedule containing a rate or charge filed pursuant to Section 4 (d).

In addition, the Act's legislative history states that it contained the "usual provisions \* \* \* such as we find in all regulatory measures enacted by Congress" and "there was nothing novel in its provisions". See 81 Cong. Rec. 6722; S. Rep. No. 1162, 75th Cong., 1st Sess., p. 3; H. Rep. No. 709, 75th Cong., 1st Sess., p. 3; H. Rep. No. 2651, 74th Cong., 2nd Sess., p. 3. Since the other federal regulatory statutes uniformly contemplate the filing of *ex parte* rate changes (in addition to Part I of the Interstate Commerce Act, see, e. g., Section 203 of the Federal Communications Act, 47 U. S. C. 203; Section 403 of the Civil Aeronautics Act, 49 U. S. C. 483; Section 18 of the Shipping Act of 1916, 46 U. S. C. 817; Section 217 (c) of the Motor Carrier Act of 1935, 49 U. S. C. 317; Section 306 (d) of the Water Carrier Act of 1940, 49 U. S. C. 906; Section 405 (d) of the Freight Forwarder Act of 1942, 49 U. S. C. 1005), it follows that Congress intended to authorize such rate changes under the Natural Gas Act, where consonant with existing contract rights.<sup>30</sup>

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<sup>30</sup> This conclusion is confirmed by the treatment of motor contract carrier rates in Part II of the Commerce Act (49 U. S. C., Ch. 8), enacted in 1935, three years prior to the Natural Gas Act, and incorporating basically the same rate filing and review procedures as that Act. Section 203 (15) (49 U. S. C. 303 (15)) of the Commerce Act defines a "contract carrier by motor vehicle" as a "person which, *under in-*

It is thus plain, as this Court recognized in *Mobile* (350 U. S. at 343), that nothing in the Gas Act prohibits, either expressly or by implication, the filing by a natural gas company of an *ex parte* rate change where rates have been set *ex parte*, or of a rate change which, as here, does not violate but accords with a preexisting agreement.

C. THE COMMISSION, IN PASSING UPON UNITED'S NEW SCHEDULES,  
IS EXERCISING A PROPER RATE-REVIEW FUNCTION

1. *The absence of an agreement as to specific rates does not make the Commission an arbiter between the parties.* We have seen that nothing in *Mobile* or the Gas Act precluded United and its purchasers from agreeing that United could fix its gas prices in the first instance, subject to Commission review. Respondents have argued, however, and the lower court apparently believed, that the Commission was powerless to review a rate set in accordance with such a procedure because its review powers are conditioned on the existence of a private agreement between the parties as to specific price; otherwise, the Commission, it is

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*dividual contracts or agreements, engages in the transportation \* \* \* by motor vehicle of passengers or property in interstate or foreign commerce for compensation*" (emphasis added). "Natural-gas company", in contrast, is defined in Section 2 (6) of the Gas Act (15 U. S. C. 717a (6)) as a "person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." Had Congress intended to require all gas prices to be fixed by "individual contracts or agreements", it could easily have said so in the Gas Act, as it did in Part II of the Commerce Act in defining and regulating the separate class of motor carriers.

said, would be an arbitrator. This misconception of the lower court as to the Commission's review function under the Natural Gas Act is revealed by its comment (R. 269) that since "the parties have not agreed to the specific rate", and the purchasers are free to oppose any increase, the Commission would have "to arbitrate a dispute when the seller sought to raise its price [and] \* \* \* the Federal Power Commission has not been given that arbitration function by statute" (R. 270). See, also, Br. in Opp. 11-12.

a. The terms of the Gas Act, however, do not limit the Commission's rate review powers under Section 4 only to those rates which are the result of express bilateral negotiation: As we have shown, *supra*, p. 47-48, the Commission is empowered by Section 4 (e) to review the lawfulness of "any such new schedule" filed pursuant to Section 4 (d), regardless of the form or derivation of the "rate" or "charge" contained in that schedule. Hence, nothing in the statutory language limits the Commission's *jurisdiction* to review a rate based on a price set unilaterally by the seller pursuant to prior agreement. The only requirement implicit in the Act is that recognized by *Mobile*: the rate filed must be based on a price or charge which is valid (contractually or otherwise), independently of the filing and of the Act.

b. The concept of "arbitration", in any case, is not at all apt for the Commission's functions in reviewing rates—whether they be set *ex parte*, or unilaterally under a contract, or by specific prior agreement of

the parties. Commission review of an *ex parte* rate, as well as Commission review of a fixed-rate contract, is not for the purpose of resolving the conflicting *private* interests of the seller and its purchasers, as is true in an arbitration proceeding, but solely to determine whether the new rates are lawful (i. e., are rates which are not "unjust, unreasonable, unduly discriminatory, or preferential") and hence may be permitted to become effective in the public interest. The source of the purchasers' right to oppose the new rates is not an explicit provision to that effect in the service-agreements—which would be the case if this were an arbitration—but rather the statutory requirement that all Commission proceedings (including proceedings to review rates instituted under Section 4 (e), as well as under Section 5 (a)) are subject to the "public interest" intervention provisions of Section 15 (a) of the Gas Act, *infra*, p. 121. While the purchasers' opposition to the new rates may be motivated by selfish interests, the Commission may permit intervention under Section 15 (a) only if it regards their "participation in the proceeding [as being] in the public interest." Thus, while the Commission is not required by statute to institute a Section 4 (e) proceeding with regard to all new filings under Section 4 (d), and United's new rates could have become effective merely upon compliance with the requirements of Section 4 (d), the fact is that when the Commission set the new schedules for hearings as

authorized in Section 4 (e)<sup>22</sup> then the purchasers were free to petition for intervention under Section 15 (a) on the ground that their participation might be in the public interest.

Consequently, the intervention by the purchasers in opposition to the rate increases, despite their agreement that United may file new schedules under Section 4 (d), does not mean that the Commission, in reviewing the new rates, is exercising an unauthorized arbitration function. The Commission can review any gas rate that is "otherwise valid" (i. e., valid under common law contract principles) upon its own initiative, and it must do so in order to meet its statutory responsibility if it considers the rate to be unjust, unreasonable, unduly discriminatory or preferential. Its jurisdiction does not depend upon agreement between the parties, but flows from the statute. So long as a rate can be filed, it can be reviewed by the Commission. Only if the filed rate violates an existing contractual commitment is the Commission barred from reviewing it in proceedings instituted under Section 4, and this is not because the Commission would thereby exercise an unauthorized arbitration function, but because such a rate would be invalid, so that there would be nothing at all before the Commission for review under Section 4.

2. *United's new schedules were actual rates, and not mere proposals.* As a part of their argument that by reserving to the seller a right unilaterally to change

<sup>22</sup> As shown *infra*, p. 79, fn. 51, since the Commission in actual practice suspends virtually all non-industrial rate increases filed by pipelines under Section 4 (d), all such rate increases are reviewed by the Commission in Section 4 (e) hearings,

rates, which the purchasers could oppose in the subsequent Commission hearings, the service-agreements contemplated an unauthorized arbitration proceeding, respondents insist that United's rate filings were mere "proposals" (see Br. in Opp. 4, 6, 11-12 and fn. 10), of the type referred to in *Mobile* (350 U. S. at 342), and therefore could not be filed under Section 4 (d).

In support of this contention, respondents refer to the Commission's use of similar phraseology in selected portions of its opinion in this case.<sup>22</sup> However, the Commission's opinion also refers to "rate filings" (e. g., R. 229, 232) and "increased rates" (e. g., R. 225, 227, 230), and it is plain that the true nature of United's filings cannot be determined by mere terminology. If words alone were conclusive, it would be highly relevant that respondents, in their motions before the Commission to reject the filings, likewise referred to United's filings as "rate increases" (see R. 143, 148, 162, 166).

Turning from terminology to substance, it is clear that the filings were actual rates and not "proposals" as that term is used in *Mobile*. This is shown by the parties' understanding of the nature of the filings (see *supra*, pp. 10-11; *infra*, pp. 112-115), as well as the consequences which flowed therefrom. Thus, as

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<sup>22</sup> It is to be noted that Section 4 (e) of the Act refers to the new schedules filed under Section 4 (d), and subject to hearing under Section 4 (e), as "the proposed change of rate . . . ." In this sense, every filed rate change is a "proposal" since it is normally subject to suspension and ultimate disallowance by the Commission.

filed by United, the new rate schedules were to be effective as of November 1, 1955, absent Commission suspension; the increased rates for sales for resale for industrial use did become effective on that date; and the rates for other sales became effective, over respondents' opposition (*supra*, p. 9, fn. 10), as of April 1, 1956, subject to refund." In these circumstances, and since the service-agreements gave United the right to change rates, the rate filings here fall not within the "proposal" language of *Mobile* relied on by respondents, but rather within the language immediately preceding and following (350 U. S. at 342):

Section 4 (d) provides \* \* \* for notice to the Commission of any "change \* \* \* made by" a natural gas company, and the change is effected, if at all, not by an order of the Commission but solely by virtue of the natural gas company's own action. If the purported change is one the natural gas company has the power to make, the "change" is completed upon compliance with the notice requirement and the new rate has the same force as any other rate—it can be set aside only upon being found unlawful by the Commission. It is thus no more a "proposed" rate than any other rate, all of which are equally subject to Commission review.

## II

**A TARIFF-AND-SERVICE-AGREEMENT METHOD OF RATE-MAKING PROTECTS THE INTERESTS OF BOTH GAS SELLERS AND CONSUMERS, WHILE THE SYSTEM CONTEMPLATED BY THE DECISION BELOW WOULD LEAD TO INEQUITIES AND INJURIOUS CONSEQUENCES**

" Sometimes, respondents recognize that the new schedules filed by United were of actual rates and had become effective as such in accordance with the provisions of Section 4 (e). See Br. in Opp. 17, 26.

Where, as here, the parties to a gas sale have agreed that the seller may set rates uniformly applicable to its sales for a given service and area, we have shown in Point I that the Gas Act, as interpreted in *Mobile*, allows the filing of such rates subject to review as to lawfulness by the Commission. This tariff-and-service-agreement rate procedure adopted by the Commission and agreed to by all the parties to this proceeding is not only lawful, but it is entirely reasonable and appropriate. It protects the interests of consumers and the public by allowing retroactive review of pipeline rates, with a refund procedure normally applicable, and at the same time permits needed rate increases to be placed into effect promptly, thus facilitating financing of pipeline expansion. Any alternative procedure which might be selected by the Commission offers no significant advantages, and falls short in one or more respects of providing full protection to the gas purchasing public. In particular, the system contemplated by the decision below would probably lead to grave inequities and spawn serious injuries.

**A. THE COMMISSION EMPLOYS THE SAME STANDARDS FOR DETERMINING REASONABLE RATES IN PROCEEDINGS INITIATED UNDER BOTH SECTION 4 (e) AND SECTION 5 (a) OF THE GAS ACT**

A factor of apparently considerable significance to a majority of the judges below, in deciding that the Commission may not accept United's new schedules under Section 4 (d), was their fear that acceptance of the contrary position "would be to give approval to a ready means of debilitating Section 5 (a)" (R. 271). According to those judges, "(b)y using the

Section 4 (e) procedures the company could get its rates into effect quickly and would avoid both the delay and the more stringent proof requirements of Section 5 (a)" (R. 271). In their view, under Section 4 (e), "the filing party would merely be required to show that the new rate \* \* \* is one which is not unlawful, i. e., that it is a rate within a zone of reasonableness \* \* \* without reference to the lawfulness or adequacy of the old rate" (R. 271). On the other hand, "in a Section 5 (a) hearing, \* \* \* a record would have to be made showing not only that the new rate was lawful, but that the old rate was 'unjust, unreasonable, unduly discriminatory, or preferential'" (R. 271). This view that the standards differ under Section 4 (e) and Section 5 (a) is predicated on a fundamentally erroneous premise.

While it is true that permitting the gas companies to file rate increases under Section 4 (d) enables them to get the new rates into effect more quickly and to avoid to a large extent the delays inherent in a proceeding instituted under Section 5 (a), it does not follow, as implied by the two judges below, that such a result violates the purpose of the Act or is undesirable. As this Court recognized in *Mobile* (350 U. S. at 341, 343), Section 4 (e) provides for basically the same hearing and review procedures—and the same standard for rates—as does Section 5 (a), *supplemented by the Section 4 (e) suspension and refund powers which are not available under Section 5 (a)*. There is therefore no ground for the fear expressed by the two judges below that use of Section 4 (d) and (e) will "debilitate" Section 5 (a) by providing the

sellers with a means of "avoiding" the "more stringent proof requirements of Section 5 (a)". That danger does not exist. The basic procedure, standards, and results of a proceeding initiated following a Section 4 filing are the same as those initiated directly under Section 5 (a), since Sections 4 (d) and (e) and 5 (a) are not alternative rate-changing procedures but rather "simply parts of a single statutory scheme" (*Mobile*, 350 U. S. at 340-341). "The basic power of the Commission is that given it by § 5 (a)" and "Section 5 (a) would of its own force apply to *all* the rates of a natural gas company, whether long-established or newly changed, but in the latter case the power is further implemented by Section 4 (e). All that Section 4 (e) does, however, is to add to this basic power, in the case of a newly changed rate or contract (except 'industrial' rates), the further powers (1) to preserve the status quo pending review of the new rate by suspending its operation for a limited period, and (2) thereafter to make its order retroactive, by means of the refund procedure, to the date the change became effective. The scope and purpose of the Commission's review remain the same—to determine whether the rate fixed by the natural gas company is lawful" (*Mobile*, 350 U. S. at 341, *italics in the original*).

It is under these governing rules that the Commission is required to proceed, and does proceed. While the proof requirements of Section 5 (a) may appear on their face somewhat more detailed than those of Section 4 (e) in proscribing rates which are

"unjust, unreasonable, unduly discriminatory, or preferential", Section 4 not only requires that new rates be "just and reasonable" and "lawful" but goes on to provide that "after full hearings, either completed before or after the rate \* \* \* goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective" (i. e. in a proceeding under Section 5 (a)).<sup>33</sup> Because of this incorporation of Section 5 (a) into Section 4 (e), the Commission has consistently construed the rate standards of the two sections as identical. As the Commission has stated in its Annual Reports to Congress, the Natural Gas Act requires that the rates for all sales subject to its jurisdiction

must be just, reasonable and nondiscriminatory, and that no changes be made except upon 30 days' notice, unless otherwise authorized by the Commission. The Commission may suspend the effectiveness of proposed changes for 5 months and hold hearings on any such proposed changes which appear to be unjust, unreasonable or discriminatory, or it may upon its own motion or upon complaint institute an investigation, hold hearings, and prescribe reasonable rates, charges, terms, and conditions."

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<sup>33</sup> See *Ayrshire Collieries Corp. v. United States*, 335 U. S. 573, 582-583, involving the comparable provision (Section 15 (7), *infra*, pp. 135-137) of the Interstate Commerce Act.

<sup>34</sup> Thirty-fifth Annual Report of the Federal Power Commission (1955) at p. 106; Thirty-fourth Annual Report of the Federal Power Commission (1954) at p. 106; Thirty-third Annual Report of the Federal Power Commission (1953) at p. 99.

This amalgamation of the rate standards under the two sections is further shown in Section 154.63 (b) (ii) of Order 144 (18 C. F. R. 154.63 (b) (3) (ii)) (*infra*, p. 126) where the Commission directed with reference to rate increases filed by gas companies under Section 4 (d):

*Preparation for hearing.* A natural gas company filing for an increase in rates or charges shall be prepared to go forward at a hearing on reasonable notice and sustain the burden of proof imposed by the Natural Gas Act of establishing that its proposed changes are just and reasonable and not unduly discriminatory or preferential.

Plainly, therefore, the Commission, in passing on rates under either section, applies the same rate standard (as *Mobile* requires), and under both sections permits only rates which are just, reasonable and not unduly discriminatory or preferential.<sup>22</sup>

Not only are the rate standards applied by the Commission under Section 4 (e) the same as those of Section 5 (a), but the rates fixed by the Commission as the result of a proceeding initiated under Section 4 (e), as here, are no different from those which would have been fixed after a proceeding begun under Section 5 (a). This is so even though the *judicial* test of the lawfulness of rates fixed by the Commission contem-

<sup>22</sup> Indeed, the argument can be made that since Section 4 (e) expressly imposes upon the gas company the burden of showing the reasonableness of the new rates, whereas Section 5 (a) contains no such provision, the requirements of Section 4 (e) are procedurally more burdensome for the gas company than those of Section 5 (a).

plates a "zone of reasonableness". Although the courts have properly employed a "zone of reasonableness" concept in reviewing rates fixed by regulatory commissions for the purpose of determining the rates' validity as measured by constitutional standards, the Commission—the administrative agency charged with the fixing of rates—does not, in determining rates in proceedings initiated under Section 4 (e) or Section 5 (a), proceed on that basis; and the "just and reasonable" rate fixed by the Commission is not a zone but a pinpoint. Since the single figure so determined by the Commission is the only one considered by it to be a lawful rate, all other rates, including the existing rate, if different from that determined by the Commission, do not in the Commission's view comply with the statutory standards and for that reason are unacceptable.

Thus, in proceedings initiated under each Section—4 (e) or 5 (a)—the Commission permits a pipeline to charge only the minimum rates which will reimburse it for its expense and provide it with a return on its rate base adequate to maintain its financial integrity and attract capital." See *Thirty-fifth Annual Report of the Federal Power Commission* (1955) at p. 107; *Thirty-fourth Annual Report of the Federal Power*

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\* Where the pipeline produces some of the gas which it sells for resale in interstate commerce, it has been held in proceedings under both Sections that the Commission may also allow for the company-produced gas the amount, in addition to the costs of production, as may be found needed to encourage exploration and development of new gas reserves. *City of Detroit, Michigan v. Federal Power Commission*, 230 F. 2d 810 (C. A. D. C.), certiorari denied, 352 U. S. 829; cf. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 603.

Commission (1954) at p. 107; Thirty-third Annual Report of the Federal Power Commission (1953) at p. 160. Once cost of service (including allowance of a fair return on the amount prudently invested) is determined, the lawfulness of any rate—whether a new one in a Section 4 (e) proceeding or an old one in a proceeding commenced under Section 5 (a)—is ascertained by comparison to cost. Only the rates which provide for recovery of no more than the cost of service are considered by the Commission to be lawful. Having determined *the* reasonable rates based on the company's costs, the Commission sets aside rates, whether new or old, which deviate from those rates and directs the company to charge only the lawful rates as so determined."

Accordingly, the difference between a proceeding initiated under Section 4 and one under Section 5 (a) is that recognized in *Mobile, i. e.*, the preservation of the status quo (for non-industrial sales)

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"In situations such as that in *Federal Power Commission v. Sierra Pacific Power Company*, 350 U. S. 348, involving an involuntary increase in a contract-fixed rate in Section 5 (a)-initiated proceedings (or Section 206 (a), the comparable provision of the Federal Power Act), the Commission must determine whether the pre-existing contract is contrary to the public interest. Where such a finding is made, the new rate constructed by the Commission will rest on the same cost basis as other rates set by it in the absence of a price contract. Where, as in the *Sierra* case on remand to the Commission (*Pacific Gas & Electric Co.*, 18 F. P. C. 15), the Commission finds that a pre-existing contract rate is not so low as to be contrary to the public interest, or governs only a *de minimis* part of the seller's business, the original contract price will stand.

through suspension of the new rate and the power to make rate orders retroactive by means of the refund procedure. The availability of these powers in Section 4 (e) proceedings—the use of which has been eliminated by the decision below since it requires (in effect) that all contested rate increases be reviewed only under Section 5 (a) (see *infra*, pp. 62–63)—has been, as we show, *infra*, pp. 64–85, of critical importance in the tremendous expansion of natural gas service to the public since World War II.

**B. THE DECISION BELOW READS THE SUSPENSION AND REFUND MECHANISMS OF SECTION 4 (e) OUT OF THE NATURAL GAS ACT, AND REQUIRES ALMOST ALL RATES TO BE PLACED INTO EFFECT ONLY PROSPECTIVELY**

We have just discussed (*supra*, pp. 55–62) one legal result thought by two of the judges below to follow from their decision, which in our view does *not* at all follow from that ruling. Conversely, it is appropriate to make fully explicit the actual legal effects which *do* follow from the decision below—although we have already suggested what these legal consequences are—before discussing the impact of those consequences upon the natural gas industry and the consuming public.

Under the decision below, new schedules may be filed under Section 4 (d) only when the purchasers have agreed to the specific level of the new rates. Under the tariff-and-service-agreement method of rate making, the Commission has forbidden inclusion of escalation clauses in the service-agreements (and a return to this undesirable method of rate setting would

not be in the consumer's interest, nor would it be likely to encourage rate agreements). Accordingly, the only situation in which a pipeline may, under the ruling below, file new schedules under Section 4 (d) is where the purchasers have specifically consented to the new rate being filed. Since it can realistically be expected that the requisite consents will be given only infrequently (see *infra*, pp. 89-93), the effect of the decision is effectively to delete, as far as the pipelines are concerned, Section 4 (e) from the Act. This means the practical excision of the suspension and refund provisions of Section 4 (e),<sup>22</sup> which Congress incorporated in the Act when it was passed in 1938, and which has been used so extensively since that time (see *infra*, pp. 76-81); that entire mechanism becomes, under the ruling below, largely a vermiform appendix with only residual functions. By the same token, new rates (not agreed to by the purchaser) cannot go into effect even temporarily until the end of a hearing instituted under Section 5 (a). There is no method for allowing them to go into effect subject to a refund procedure. The old rates must continue in full force until the Commission has completed its hearing under Section 5 (a) and has rendered a decision holding the new rate to be the lawful one.

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<sup>22</sup> Section 4 (e), *infra*, p. 119, provides that, except for sales for industrial resale, the Commission may suspend, for a five-months period, any rate change filed under Section 4 (d), and thereafter, when the suspended rate goes into effect, the Commission may require a refund bond and undertaking, so that after the completion of the hearing the company can be ordered "to refund, with interest, the portion of such increased rates or charges by its decision found not justified. \* \* \*".

**C. THE TARIFF SYSTEM HAS FACILITATED THE TREMENDOUS EXPANSION OF THE NATURAL GAS INDUSTRY BY ENABLING GAS COMPANIES' RATES TO KEEP PACE WITH INCREASING COSTS**

The effect of the tariff system, combined with the refund procedure of Section 4 (e) of the Act, has been greatly to aid the tremendous expansion of the natural gas industry since World War II, and thus to provide gas to ever-increasing numbers of consumers throughout the nation. The legitimate interests of the pipeline companies and their investors have been advanced, but at the same time the proper interests of the consumer have likewise been protected by the tariff-and-service-agreement system, as it has operated in the past.

1. *The growth of the natural gas industry.* While the natural gas industry is one of the Nation's oldest, having been in continuous operation since 1816, it was for a long time very restricted in scope." Until at least the early 1920's, natural gas service was generally limited to market areas fairly close to the natural gas fields because of limitations in the technique of constructing long transmission lines, as well as other factors. *Ibid.* With the development of the mechanical coupling and large-diameter thin-wall weld pipe, together with the opening of two outstanding natural gas reserves, the Monroe field in Louisiana and the Amarillo (Panhandle) field in Texas, all in the late

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" See *Gas Requirements and Supplies of the Gas Utility Transmission and Distribution Industry 1950-1955*, issued by the United States Department of the Interior, Petroleum Administration for Defense, November 1952 (hereafter cited as *Gas Requirements*) at p. 8.

1920's, pipelines began to reach farther out for markets and new uses were developed for gas within existing and new markets. *Id.* at pp. 8, 13. The early 1930's saw initial deliveries of the first long-distance gas pipelines, such as the Natural Gas Pipeline Company of America bringing gas into the Chicago area, the Panhandle Eastern Pipe Line Company with connections in the Appalachian area, the Northern Natural Gas Company serving Iowa, Nebraska and Minnesota, and the Colorado Interstate Gas Company serving Colorado. *Id.* at p. 8.

The industry continued to expand despite depressed economic conditions so that by 1942, four years after the Natural Gas Act was enacted, there were 32 major pipeline companies with a gross gas plant investment of \$889,490,000.00, operating 29,624 miles of transmission lines. In that year, 916 million Mcf of natural gas was transported in interstate commerce (Thirtieth Annual Report of the Federal Power Commission (1950) at p. 17), and there were about 7,700,000 consumers of natural gas. *Gas Facts*, American Gas Association—Bureau of Statistics (1949), at p. 84.

While there was relatively little pipeline construction during the war years, the termination of active hostilities in 1946 witnessed a powerful upsurge in industry to unexampled levels of peacetime production which would have been impossible without natural gas. Twenty-sixth Annual Report of the Federal Power Commission (1946) at pp. 1-2. In its report for that year, the Commission stated (at p. 2) that the year had seen a "dramatic expansion of the use of

natural gas. This expansion includes not only steadily increasing use of natural gas in regions which have been served for a number of years, but also an increasing call for this low-cost and convenient fuel from areas which had hitherto depended on manufactured gas for this type of energy. The 1946 consumption of natural gas by utility customers reached a total of 2,191 billion cubic feet, an increase of 50% over the 1,454 billion cubic feet in 1940." Outstanding among the industry's problems at that time was the meeting of the even more "dramatic increase since VJ-Day in the space heating demand, which rises to sharp peaks whenever the area involved is hit by a severe cold wave" (*ibid.*). To deal with this serious problem, "emergency steps [had to be] taken to assure the allocation of available gas" (*id.* at pp. 9-10) since pipeline capacity fell far short of demand.

Although the Commission issued 132 certificates of public convenience and necessity authorizing new facilities valued at about \$275,000,000 in 1947, and utility sales of gas during that year reached "the tremendous total of over 2½ trillion cubic feet," approximately 15% higher than the 1946 total, the demand for gas nevertheless continued to grow and the problem of allocating gas in shortage areas persisted." See

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"This problem was reduced to manageable proportions when the relatively mild 1948-1949 winter enabled the companies, under the Commission's supervision, to promulgate permanent rules of priority and allocation for future emergencies. See Twenty-eighth Annual Report of the Federal Power Commission (1948) at pp. 84-90; Twenty-ninth Annual Report of the Federal Power Commission (1949) at pp. 112-114.

Twenty-seventh Annual Report of the Federal Power Commission (1947) at pp. 2-3, 72-77; Twenty-eighth Annual Report of the Federal Power Commission (1948) at p. 4. To meet the apparently insatiable demand for gas, the industry undertook further expansion in 1948, at which time the Commission's authorization of the construction of new pipeline facilities exceeded that of 1947, measured in terms of pipeline mileage, compressor horsepower, and cost. "In all of these respects, the 1948 authorizations represented the record totals reached during the Commission's 10-year administration of the Natural Gas Act of 1938." See Twenty-eighth Annual Report of the Federal Power Commission (1948) at p. 56.<sup>a</sup> As a result of the expansion during the decade from 1938 to 1948, the major pipeline companies now operated 42,957 miles of transmission pipelines with a gross plant investment of about 1.75 billion dollars and a net investment of 1.3 billion.<sup>a</sup> There were in excess of 11.4

<sup>a</sup> "They involved 8,468 miles of new pipe line as compared with 5,369 in the 1947 period, 531,455 additional horsepower at compressor stations as contrasted with the 1947 total of 360,349 and aggregate estimated costs of \$520,000,000 as against the previous year's figure of \$273,000,000" (*ibid.*).

Two certificates issued in 1948 were of outstanding significance: one was for the conversion of the Big and Little Inch pipelines to the transportation of natural gas from the Southwest to the Midwestern, Appalachian and Philadelphia areas at a total cost of \$172,000,000; and the second was for the construction of a 1,840 mile pipeline from the Gulf coast in Texas and Louisiana to bring natural gas to the New York area for the first time, at a cost in excess of \$150,000,000 (*id.* at pp. 56-57.)

<sup>a</sup> *Statistics of Natural Gas Companies*, Federal Power Commission (1956) at p. ix.

million ultimate consumers, an increase of about 5.9 million since 1938, using gas at the rate of slightly less than 3 trillion cubic feet a year, about  $2\frac{1}{2}$  times the comparable 1938 figure."

Striking as was the expansion of the natural gas industry during the decade prior to 1948, it was dwarfed by the expansion which took place during the decade thereafter. For despite the expansion in service which had already taken place, there still were tremendous unsatisfied demands for natural gas. *Gas Requirements, supra*, p. 64, fn. 39, "a comprehensive study undertaken by the Gas Planning Division of the Petroleum Administration for Defense to determine, on a natural and regional basis, the gas consumer requirements and the gas industry's supply capabilities during the period from 1950 to 1955" (at p. 3) forecast for that period (at p. 1):

6. For natural gas utilities alone a potential increase of 68% is expected in annual sales by 1955 increasing to 6.5 trillion cubic feet from 3.9 trillion in 1950. Potential residential base load is expected to increase 49%, residential space heating load 96%, commercial and other loads 63%, and industrial loads 63% \* \* \*

9. Residential space heating customers of natural gas utilities show a potential increase from 9,086,600 at December 31, 1950 to 14,446,800 at December 31, 1955 \* \* \*

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\* *Gas Facts*, American Gas Association—Bureau of Statistics (1949) at 2; Thirtieth Annual Report of the Federal Power Commission (1950) at pp. 12, 13.

These forecasts were amply fulfilled. By 1955, annual sales had increased to 6.3 trillion cubic feet; residential load had increased to 2.0 trillion cubic feet, as compared to 900 billion cubic feet in 1949, an increase of over 100%; the commercial load in 1955 was 550 billion cubic feet, as compared to the 1949 figure of 300 billion cubic feet, an increase of 83%; and the 1949 industrial load of 1.78 trillion cubic feet had become 3.4 trillion cubic feet in 1955, a 100% increase." As predicted, the number of residential space heating customers had increased to 14.7 million by 1955 with the total of natural gas consumers being 22.8 million."

Not only do the 1956 figures show a continued growth in natural gas service," but the demand for more gas service has also continued unabated. Whenever an application for authority to construct additional facilities is filed with the Commission, various distributing companies and municipalities along the route of the pro-

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"*Gas Facts*, American Gas Association—Bureau of Statistics (1949), p. 2; *Gas Facts*, American Gas Association—Bureau of Statistics (1955), p. 2 (therm=100 cu. ft.).

"*Gas Facts*, American Gas Association—Bureau of Statistics (1955), p. 1.

"The comparable figures for 1956 are:

Annual sales.....	6.9 trillion cubic feet
Residential sales.....	2.2 trillion cubic feet
Commercial.....	600 billion cubic feet
Industrial.....	3.8 trillion cubic feet

Residential space heating consumers increased 1.37 million over 1955 bringing the 1956 total to 16.07 millions, and the total number of consumers was 25.2 million in 1956. See *Gas Facts*, American Gas Association—Bureau of Statistics (1956), pp. 2, 1; fn. 44, *supra*.

posed line invariably intervene, requesting that the pipeline be required to furnish them with new or additional service.

In order to meet these great demands for natural gas service, the pipelines have been compelled continuously to expand their facilities." As a result of this expansion, the natural gas pipeline industry has grown from a purely local activity restricted to the vicinage of the gas producing fields to a great interstate network of pipelines bringing gas from the fields to nearly all corners of the nation. Today, the gas industry is the sixth largest in the country.

This expansion by the natural gas industry has had a salutary effect upon the rest of the economy. For example, the availability of supplies of low cost natural gas has fostered the growth of new industries with additional employment opportunities in many communities. Natural gas has helped to "redress the balance" between energy-rich and energy-poor sections of the country, bringing a highly desirable low cost fuel to areas without close access to water power or coal deposits. In addition, natural gas has facilitated the enormous construction of residential housing needed to alleviate the acute post World War II shortages; in several instances, the construction of such

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"Since 1948, they have added 54,254 miles of transmission lines, and 4,007,700 compressor horsepower at a total estimated cost of \$4,860,000,000. As of December 31, 1956, the gas utility plant investment was 6.3 billions of dollars; and new utility plant investment (gross less reserve for depreciation) was 5 billions; an increase of close to 350% over the comparable figures for 1948. *Statistics of Natural Gas Companies*, Federal Power Commission (1956) at p. ix.

housing was delayed until supplies of gas were assured. Furthermore, the expansion of the gas industry has not only necessitated large-scale increases in employment within the industry itself, but since construction has been going forward at the average cost of about \$500 million per year, and steel pipe is the largest item needed in pipeline construction," the expansion of the natural gas industry has made a large contribution to the growth and health of the construction and steel industries.

2. *The ability to adjust rates expeditiously by filing new schedules under Section 4 (d), as allowed by the service-agreements, has been an essential element in the industry's expansion.* To date, the only feasible means of transporting gas for any measurable distance is by pipelines, the diameter of which is governed by the quantity of gas to be transported. The long distance pipelines almost invariably require pipes of a diameter of 16" or more, with many lines using 36" pipes. Thus, the construction of a major pipeline from the producing fields in the Southwest to the consuming areas in the Northeast or Midwest required large quantities of pipes (*supra*, fn. 48), and consequently heavy investments in pipeline facilities. For example, the Commission in authorizing the 1,840-mile pipeline for natural gas service to metropolitan New York, estimated the cost to be more than 150 million dollars, and possibly as high as 180

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"*Gas Requirements* estimated (at p. 52) that over six million tons of pipe, 16" and larger in diameter, would be needed for the 1952-1955 expansion.

million dollars or an average of close to \$100,000 per pipeline mile. See *supra*, p. 67, fn. 41.

In view of the magnitude of the investment required for the construction of a major pipeline system, such a project normally could not be undertaken—nor would the necessary financing be forthcoming—unless there was substantial assurance of adequate sales and revenues over the long life of the project. As stated in *Gas Requirements* (at p. 5):

A continuance of the rapid expansion of gas demand is expected and this will require substantial pipe line construction to transport the gas. It has been reported that the timing of future pipe line construction will be dependent in some degree on the outcome of rate proceedings before public utility regulatory bodies and the maintenance of a satisfactory level of earnings. This factor may also contribute to delays in connecting new gas demands as they appear.

In most instances prospective investors would have to be satisfied that the pipeline would receive revenues sufficient to cover capital as well as operating costs before they would be willing to make the requisite loans at reasonable rates.

Of the two elements, adequate sales and adequate revenues, the former could be—and was—assured by entering long term sales arrangements with prospective purchasers. The purchasers, on their part, were similarly anxious to obtain long term commitments since their operations likewise entailed heavy capital expenditures.

The latter element, that of adequate revenues, involved related but more complicated considerations.

A fixed-price contract might provide adequate revenues for a time, or might be employed, as in *Mobile*, in specific transactions designed to obtain business which otherwise would be lost irretrievably. Such fixed-price agreements, when applied to all of a pipeline's sales for the entire contractual period, might fall short, however, of assuring sufficient revenues. Although gross revenues would be relatively constant under such contracts, costs would be free to rise, unforeseen contingencies might occur, and net revenues, which constitute the remainder left after costs are paid, would be liable to decrease with increases in costs.

Hence, before a pipeline could enter into a long-term fixed-price contract covering any substantial part of its business, it would be confronted with the necessity of fixing rates at a level sufficiently high to cover major contingencies. Purchasers, however, might not be willing to pay such a price, nor would the Commission be willing to approve such rates as lawful in light of the cost picture when the rates were fixed. Therefore, in order to meet the Commission's standards that rates cover no more than current costs, and at the same time obtain the required heavy loans from the financial institutions, the pipelines' contracts with their purchasers have provided for adjustments in rates.

Prior to the promulgation of Order No. 144 (*supra*, pp. 4-5), the pipelines typically had dealt with this problem by including in their sales contracts clauses providing for appropriate price adjustments during the usual 20-year life of the agreement. Among the

more common types of clauses were those under which the price could be increased to reflect increases in taxes, the cost of purchased gas, the commodity price index, or the wholesale price index. By virtue of these escalation clauses which, in one way or other, paralleled the major cost increases which might be incurred by the pipelines and which, being automatic in operation (subject to Commission review for lawfulness under Section 4 (d)), could not be frustrated by the purchaser's withholding of assent, the pipelines were able until 1948 to earn net revenues adequate to obtain financing for the large-scale construction of new and additional facilities.

The tentative drafts of Order No. 144 not only had banned these escalation clauses but had failed to include any provision for the filing of rate changes by the pipelines. This was so because, as the Commission then construed the Act, the pipelines could unilaterally change contract rates by filing new schedules under Section 4 (d), and hence an explicit provision in the Order authorizing the reservation of such a right was, in the Commission's view, superfluous. Many pipelines, however, including United, were doubtful as to the Commission's construction of the Act and wished to preserve their rights under escalation clauses. See Appendix B, *infra*, pp. 129-132. In order to allay the pipelines' objections and to make the Order effective with a minimum of further delay, the Commission, while adhering to its original view, added a proviso in Section 154.38 (d) (3) (18 C. F. R. 154.38 (d) (3), *infra*, p. 125) that a "natural-gas company may state in the service agreement or in rate schedules filed

pursuant to § 154.52 that it is or will be its privilege, under certain specified conditions, to propose to the Commission a modification, change or substitution of the then effective rate or charge", but that such changes must be made as "provided in section 4 of the Natural Gas Act." As a result, the Commission, and the industry have largely been in agreement—although different bases for the concurrent conclusion have been expressed—that the tariff-and-service-agreement method of rate setting enables the pipelines to change rates under Section 4 (d) without the further assent of the purchaser. See *United Gas Pipe Line Co. v. Federal Power Commission*, No. 216, Oct. Term 1950, R. at pp. 27, 45, 103, 121, 159. See also Appendix B, *infra*, pp. 129-132.<sup>42a</sup>

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<sup>42a</sup> Respondents will probably urge that, because of the phrase "under certain specified conditions", the proviso in Order No. 144 did not authorize the pipelines to reserve in their service-agreements a right generally to change rates. But the Commission's statements and practice show that it did not intend this phrase to operate as a *substantive* limitation upon the pipelines' right to change rates; rather, the Commission intended to make clear that a pipeline could change its rates generally only by complying with certain *procedural* requirements. Thus, in denying rehearing on Order No. 144, the Commission pointed out that among the "conditions which must be satisfied by any natural-gas company which proposes to change any such filed rate schedule, tariff or contract", are that the pipeline "must (1) give adequate notice as required by Section 4 (d) of the Act and Sections 154.16 and 154.22 of the regulations, including service upon each affected customer; and (2) furnish to the Commission information as to the reasons and justification for the proposed change, as required by Section 154.63 of the amended regulations. \* \* \*" *United Gas Pipe Line Co. v. Federal Power Commission*, No. 216, Oct. Term, 1950, R. at 275; see also 13 Fed. Reg. 6372. In accordance with this explanation of the phrase, the Commission has con-

This general understanding of the industry—that escalation clauses were no longer necessary because the pipelines could file (under the proper type of service-agreement) new rates under Section 4 (d) without the purchasers' assent to the new rates—aided the pipelines in obtaining financing for the vast facilities expansion needed to meet the tremendous demand for gas in the post-1948 period.<sup>400</sup> For a rate change filed under Section 4 becomes effective 30 days after filing if the Commission, after preliminary examination, does not believe a hearing to be warranted; and if the Commission does enter upon a hearing, the new rates could become effective, subject to refund of the excess (if any) over the lawful rate, after a suspension of five months. Since a lawful rate under the Commission's rate standards contemplates reimbursement of costs plus a fair return (*supra*, pp. 60-61), the pipelines' right to file rate changes under Section 4 (d) assured that their rates would not lag substantially behind costs. This assurance has been of particular significance in the post-1948 period when costs have risen sharply and steadily, emphasizing the importance of expedition in obtaining needed rate increases.

sistently, after as well as before *Mobile*, accepted for filing general rate increases under service-agreements, similar or comparable to those of United here involved, filed with the Commission pursuant to this proviso. *Infra*, pp. 110-112. This administrative construction by the Commission of its own regulation is, under established principles, entitled to great weight. *Bowles v. Seminole Rock and Sand Co.*, 325 U. S. 410, 414.

United continued to rely on its escalation clauses until July 1952, and it continued to challenge Order No. 144 until the settlement embodied in the Commission's Opinion No. 277 in November, 1954. See *supra*, p. 6, fn. 5; and Brief for petitioner in *United Gas Pipe Line Co. v. Federal Power Commission*, C. A. D. C., No. 10125, at pp. 15-16.

Since the pipelines have thus been able to keep rates current, they have been able, despite substantially increased expenses, to undertake the vast expansion program necessary to meet the overwhelming demand of ultimate consumers for natural gas, and at the same time generally to maintain an adequate level of earnings. Pipeline securities, aggregating well over 4.4 billion dollars,\* have, accordingly, been favorably received by investors and lending institutions. By enabling the pipelines to maintain this flexibility of rates, it has been possible to accord the proper balance to the investor interest, which, as stated in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 603:

\* \* \* has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. \* \* \* By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

3. *The consumer interests have been protected by the tariff-and-service-agreement system.* Respondents claim that the filing of unilateral rate changes under

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\* *Statistics of Natural Gas Companies*, Federal Power Commission (1956) at p. ix.

Section 4 (d), in accordance with the service-agreements, fails in a number of respects to protect the consumer's interest and must therefore be rejected under the Act. This contention is without merit.

(a). The fact that a pipeline seller under Section 4 can file and place temporarily in effect a rate higher than its purchaser might agree to, on the basis of individual bargaining, has not in practice resulted in excessive or exorbitant rates. For at the same time that the pipelines have been able to retain needed rate flexibility and thus to benefit ultimate consumers by greatly expanded service, the Commission has maintained the requisite "balancing of the investor and the consumer interests" (*Federal Power Commission v. Hope Natural Gas Co.*, *supra* at 603) by "protect[ing] consumers against exploitation at the hands of natural gas companies" (*id.* at 610). As already shown, *supra*, pp. 55-62, the Commission in proceedings begun under Section 4 (e), as in Section 5 (a) proceedings, determines the just and reasonable rates by measuring them by the cost-of-service standard; under this standard, rates are fixed at the level no higher than necessary to allow recovery of costs and a fair return on capital."

Moreover, each rate increase filed by the pipelines under Section 4 (d) pursuant to their service-agreements has received close scrutiny from the Commis-

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"This standard takes account of an allowance in addition to costs necessary to encourage exploration and development of new gas reserves by pipelines, which has been held to be in the interests of the consumer. *City of Detroit, Michigan v. Federal Power Commission*, 230 F. 2d 810, 818 (C. A. D. C.), certiorari denied, 352 U. S. 829.

sion to make sure that the new rate complied with these cost-of-service standards. Thus, while the Commission is not, as respondents point out (Br. in Opp. 17), required to enter upon a hearing in connection with every new rate filing under Section 4 (d), the Commission has, in actual practice, suspended all non-industrial rate increases filed by the pipelines with only infinitesimal exceptions;" as a result, all such increases are reviewed by the Commission in Section 4 (e) hearings. Those affected by the new rates, including the purchasers, both direct and indirect (such as respondents), have typically been permitted to intervene and to question the lawfulness of the new rates through cross-examination of the witnesses introduced by the pipelines and the Commission's staff, as well as through their own experts."

While the rates become effective after the five months suspension, they are effective only tenta-

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"During the fiscal year ended June 30, 1957, over \$95,000,000 in pipeline annual suspendible increases were filed with the Commission. Of this amount, only \$100,000 was permitted to go into effect without suspension and hearing. These latter increases were unopposed in virtually every case.

"Contrary to respondents' implication (Br. in Opp. 17), the Commission has, in accordance with Section 15 (a), *infra*, p. 121, been very liberal in permitting intervention. In addition, the Court of Appeals for the District of Columbia Circuit, which has taken a broad view of "aggrievement" (*National Coal Association v. Federal Power Commission*, 191 F. 2d 463 (C. A. D. C.); *City of Pittsburgh v. Federal Power Commission*, 237 F. 2d 741 (C. A. D. C.)), has held that "any person who would be 'aggrieved' by the Commission's order" has the right to intervene. *National Coal Association v. Federal Power Commission*, *supra* at p. 467; *Memphis Light, Gas and Water Division v. Federal Power Commission*, 243 F. 2d 628, 631 (C. A. D. C.).

tively, being subject to refund (with interest) to the extent the Commission finds them excessive. *Supra*, pp. 62-64.<sup>52a</sup> Since the Commission has, for all practical purposes, retroactive rate authority in Section 4 (e) proceedings, the Commission has had the time to investigate fully and evaluate the multitudinous details which go to make up pipeline's costs. Accordingly, in a rate proceeding under Section 4 (e) dual protection is accorded to the consumer interest:—(1) new rates do not become fully effective unless and until the Commission is satisfied, after careful study, that the statutory standards—which are primarily to protect the consumer interest—have been fully met; and (2) by virtue of the suspension and refund provision, the Commission is able to assure that the rates paid during the pendency of the proceeding are ultimately adjusted in accordance with the Commission's findings as to lawfulness.

In this connection, it is noteworthy that during the period from 1935 through 1956 indices published by the Bureau of Labor Statistics (B. L. S. 56-862, 57-2059) show an increase of 98% in the cost of living (from 58.7 to 116.2, using 1947-1949 as 100.0), but the cost of gas increased for residential uses other than space heating only 13.7%. During the post-1948 period of rising costs and almost explosive expansion of pipeline facilities, the average retail price of natural

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<sup>52a</sup> During the calendar year 1956, the Commission ordered refunded to gas purchasers over \$63 million paid to pipelines which had been based on rates placed into effect subject to refund under Section 4 (e), and ultimately found unlawful by the Commission.

gas for space heating purposes had as of 1957 increased approximately 21.5% over its 1947-49 average, compared with a 30.7% increase in the retail price of solid fuel and fuel oil, and a 28.7% increase in the price of transportation. This increase compares favorably with the 16.2% increase in the average of consumer retail prices during the same period.<sup>53</sup> These figures indicate that price regulation under the tariff-and-service-agreement system, as implemented by Section 4 (e), has provided protection to the ultimate consumers against excessive rates for gas at the same time that the pipelines have, with the help of rate flexibility, obtained the necessary financing vastly to expand their service to the consumers in a period characterized by steadily increasing material and manpower costs.

(b). Respondents also claim that permitting new rates to be filed without the purchasers' assent, in accordance with the service-agreements, fails to protect consumer interests because of the prohibition in Section 4 (d) against the suspension of rates for sales for industrial resales (Br. in Op. 16-17). This argument gives undue weight to the extent of such non-suspendible sales and their impact on the consumer. While many pipeline sales include gas for industrial resale, the rates for such sales are non-suspendible only if set out in schedules separate and distinct from other suspendible sales being made. See *State Corporation Commission of Kansas v. Federal Power Commission*, 206 F. 2d 690, 698-702 (C. A. 8),

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<sup>53</sup> Bureau of Labor Statistics figures, reported in *Gas Facts*, American Gas Association—Bureau of Statistics (1956) at pp. 232-233.

certiorari denied, 346 U. S. 922. Of the eighty largest pipeline companies, only seven make separate (and thus nonsuspendible) sales for industrial resale, and such sales averaged only 6.1% of the total dollar volume of their jurisdictional business during the calendar year 1956, or fiscal years ending in 1956 and 1957. Petitioner United's nonsuspendible jurisdictional sales during calendar 1956 averaged 2.92% of its total jurisdictional business. Plainly, the suspension procedure which is applicable to the great majority of gas sales should not be invalidated because it cannot cover such a small percentage of the sales.

Moreover, the Commission has repeatedly recognized the inequity of the prohibition against suspension of rates for industrial resales and has recommended that it be removed from the Act in each of its annual reports to Congress since 1951, and for some years prior thereto in its justification for appropriations. Annual Reports of the Federal Power Commission, for 1951, 1952, 1953, 1954, 1955, 1956 and 1957 at pp. 144, 152, 154, 170, 181, 18 and 24, respectively. However, Congress, which deliberately inserted the prohibition on suspension of industrial rates when it passed the Act in 1938, has not as yet seen fit to adopt this recommendation.

(c). In addition, respondents attack the rate practice heretofore followed by the Commission, and accepted by the industry generally, on the ground that, by enabling the pipelines expeditiously to pass on increases in costs, it destroys any incentive on their part to resist price increases by the gas producers. But

there is no reason to believe, nor do respondents suggest any to support their sweeping implication, that the pipelines generally are any the less alert to discharge their responsibilities to the public than are the local distributing companies which characteristically are also in a position to pass on their increased costs. In any event, respondents' argument proceeds on the premise that the prices charged by the producers are free from Commission regulation, a plainly invalid premise in light of this Court's decision in *Phillips Petroleum Co. v. State of Wisconsin*, 347 U. S. 672. See also *Cities Service Gas Company v. State Corporation Commission of Kansas*, 355 U. S. 391. Since producer rates are subject to the Act, the Commission is not bound to accept as lawful the price which the pipeline has contracted to pay, and in rate proceedings instituted with respect to such prices the indirect purchasers of gas (such as respondents), as well as the direct purchasers, may apply for leave to intervene and attack the lawfulness of the new rates. The Commission has suspended over 1100 producer rate increases since 1954; it is exercising its regulatory control in this vital area.

(d). Respondents also suggest (Br. in Opp. 28, fn. 27) that, since (after initial suspension) the filed rates go in effect (subject to refund) and hence are merely tentative until finally passed upon by the Commission, there is a resulting instability which destroys the utility of "unilateral filing of rate increase proposals" (*ibid.*) under Section 4 (d).

The same rate instability, however, would result if

the purchaser had agreed to the new specific rate itself, as respondents urge is the proper interpretation of Section 4 (d). For in that situation, also, the Commission would not be required to accept the parties' rate agreement without question; there, as well as here, the Commission could set the agreed-upon rate for hearing under Section 4 (d) and permit the rate after suspension to become effective, subject to refund.

Moreover, the comments of the Commission, and of representatives of one pipeline company, which respondents cite (*ibid.*), did not express a preference for another procedure or disapproval of Section 4 proceedings as such.<sup>44</sup> On the contrary, the Commission's comments were made at a time when the Commission had just been confronted with the initial wave of rate increases compelled by sharply rising costs and its comments supported a request for the necessary additional staff and facilities to handle the greatly increased volume of rate filings. Had these filings been reviewable only in proceedings instituted under Section 5 (a), in the sense held by the court below, the burden on the Commission's staff and its budgetary requests would have greatly increased and the Commission would have regarded the situation as even more unsatisfactory.

Finally, it is significant that the Section 4 (e) proviso allowing a new rate to be effective, subject to

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<sup>44</sup> Indeed, that Colorado Interstate Gas Company prefers the asserted instability of rates under Section 4 (d) to being remitted to proceedings under Section 5 (a) is manifest from the fact that it has joined a number of other pipelines in filing an *amicus* brief urging reversal of the judgment below.

refund, is closely analogous to a stay granted in judicial proceedings for review of a Commission rate order. The grant of a stay of the order pending court examination creates similar problems of interim rate instability and of distribution of an accumulated fund following ultimate decision. See *Federal Power Commission v. Interstate Natural Gas Co.*, 336 U. S. 577. Although the granting of a stay in these circumstances is discretionary, the reviewing courts have almost invariably stayed challenged orders. Despite the problems of delay and the inability to achieve complete justice in distributing the accumulated fund, the courts have uniformly recognized that a stay affords the best available means of protecting the interests of all parties. See *Federal Power Commission v. Interstate Natural Gas Co. supra*; *Northern Natural Gas Co. v. Federal Power Commission*, 245 F. 2d 447 (C. A. 8), certiorari denied, 355 U. S. 869.

**D. NONE OF THE SUGGESTED ALTERNATIVES TO THE TARIFF-AND-SERVICE-AGREEMENT SYSTEM IS PRACTICABLE OR MORE DESIRABLE**

While the tariff-and-service-agreement method of rate fixing, under which the pipelines reserve the right to file rate changes under Section 4 (d) without the further assent of the purchaser, may have certain collateral defects, the Commission believes it to be the best available in the circumstances to achieve the necessary accommodation between regulation in the public interest and the need for rate flexibility—it is a system which reaches on an industry-wide basis “a reasonable accommodation between the conflicting interests of contract stability on the one hand and public

regulation on the other" (*Mobile*, 350 U. S. at 344). The alternatives suggested by respondents and the municipality *amici* fall far short of providing that accommodation.

(a). Respondents suggest (Br. in Opp. 22) that the Commission permit the pipelines generally to negotiate separate contracts with each of their purchasers, and thereby revert to the pre-1948 method of rate fixing.

Although individually-negotiated contracts for each sale could contain various types of escalation clauses and thus provide the needed rate flexibility, it would make it extremely difficult for the Commission to discharge the responsibility imposed upon it by Section 4 (b) of the Act, *infra*, p. 118, which provides:

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

As already indicated, when the Commission required conversion to the tariff-and-service-agreement method, it had already had 10 years of experience with individual contracts and with the tariff method as voluntarily adopted by a number of pipelines. *Supra*, pp. 3-4; see, also, Twenty-Sixth Annual Report of the Federal Power Commission (1946) at pp. 53-54; Twenty-Seventh Annual Report of the Federal

Power Commission (1947) at pp. 67-68; Twenty-Eighth Annual Report of the Federal Power Commission (1948) at pp. 83-84. This experience led the Commission to comment upon the evils of the individual contract method at the time it issued Order No. 144, providing for uniform gas tariff-and-service-agreements:

The supplementation of filed contracts by additional agreements and the filing of new contracts in time multiplied the complexity of already complicated rate schedules. In addition, the results of the many individual negotiations seemed to be departing further from the statutory requirements of no discrimination."

The virtually insurmountable obstacles which the individual-contract method of fixing rates presented in the way of controlling preferences and discrimination was further emphasized by the Commission in its

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"Twenty-Ninth Annual Report of the Federal Power Commission (1949) at p. 111. The Commission went on to point out the affirmative benefits from the conversion (at pp. 111-112):

Most important is the resulting uniformity in treatment of all customers of an individual natural-gas company, representing a direct approach to the elimination of discrimination. Of almost equal importance is the fact that rate structures of natural-gas companies, heretofore hidden in voluminous and complex contractual arrangements, are stated simply and are more understandable by the general public. Illustrating this is the fact that some 44 tariffs which are now on file contain a total of 850 sheets, replacing as rate schedules 9,000 pages contained in more than 500 contractual instruments. The natural-gas companies themselves benefit: the very concept of uniformity inherent in the tariff has simplified their negotiations with the industrial customers.

Opinion No. 308, *El Paso Natural Gas Company*, 19 F. P. C. 154 (issued January 24, 1958) (reprinted in the Reply Memorandum for the Federal Power Commission (on the petition for certiorari)), App. 12a-13a).

When rates are established by private contract, the possibility of undue discrimination against or preference for individual customers is ever present. The bargaining position of each pipeline customer is—theoretically in all cases, and actually in many cases—different from that of other customers. Rates under private contracts may therefore, if for no other reason, tend to reflect the conditions of the particular bargaining process rather than the public interest in uniformity. With rate-making by tariffs, this tendency is counteracted, through the statement in such tariffs of the general kinds and classifications of service offered (see Regulations Sec. 154.38 (c)) to which all who qualify are eligible. With rate-making by tariffs, changes in rate levels whether by way of increase or decrease, necessary to reflect cost-of-service prevailing for the time being, may with comparative simplicity be spread equitably among the scores or hundreds of customers and localities supplied by any given pipeline.

The Commission views with concern the administrative problem that it would face in continuously supervising the rates of the already vastly expanded and complicated pipeline industry of today and of the future, if contract rates are required to be substituted for uniform tariffs under the *Memphis* ruling. Even as of 1948, when the facilities and operations of this industry were far more restricted than they are now, it was clear that the public interest, in-

cluding simplification of the administrative process, required that rates in contract form be restated as tariffs, as found in Order No. 144, *supra*. The same interest is doubly clear now that the industry has undergone and continues to undergo very considerable expansion.

However much individual contracts would provide rate flexibility (such as by escalation clauses, with their inherent capacity for lifting rates too much), use of such individual contracts by the pipelines today, in view of the industry's tremendous expansion, would go a long way toward frustrating a highly significant aspect of regulation in the public interest." On the other hand, there would be no measurable gain for the consumer or for the gas industry as a whole, when compared with the tariff-and-service-agreement system.

(b). It is also claimed that the needed rate increases can be obtained through negotiations by the pipelines with their customers. In support of this assertion, respondents point to several instances in the past in which, according to respondents, negotiations have resulted in an agreement as to increased rates (Br. in Opp. 21). In the same vein, the municipality

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<sup>56</sup> While, as respondents point out (Br. in Opp. 22), the Commission has not required the independent producers to fix their rates under uniform agreements, the reason is that the Commission has been regulating independent producer rates only since this Court's decision in 1954 in *Phillips Petroleum Co. v. State of Wisconsin*, 347 U. S. 672, and there are a number of problems which must be reduced to manageable proportions before it would be feasible to require conversion by the independent producers to the tariff-and-service-agreement method of fixing rates.

*amici* quote excerpts from the Commission's Annual Reports approving the conference method of disposing of rate applications. (Mun. *Amici* Br. in Opp. 7-8).

Although the Commission encourages negotiations between the parties as a means of arriving at agreed rates and there have been some settlements of rate cases, there still are many instances in which the parties have not been able to reach an agreement upon the various issues involved, let alone an agreement upon the specific rates to be charged.<sup>\*\*\*</sup> Thus, in its Thirty-Fourth Annual Report (1954), the Commission, after commenting, as quoted by the municipality *amici*, upon the success of the conference method in expediting the processing of rate applications, went on to point out (at p. 108):

While a large number of cases were settled through the conference procedure, practically all were decided on an overall dollar basis and each left many important controversial issues to be resolved at some future date. These relate to such matters as cost allocation, form of rates, tariff conditions, method of zoning charges, etc.

The Commission's Thirty-Fifth Annual Report (1955), also cited by the municipalities (Mun. *Amici* Br. in Opp. 8), contains a similar elaboration to which the Commission appended the further notation (at p. 111):

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<sup>\*\*\*</sup> Of the seventeen Section 5 (a) or combined Section 4 (e) and 5 (a) proceedings concluded by the Commission between 1948-1956, only four involved settlements at any stage of the proceedings.

Some of these controversial issues are generally not susceptible to resolution by agreement but require Commission decision after full and often protracted hearings.

Not only has the settlement procedure left difficult issues for resolution by the Commission in many instances, but many of the settlements which have taken place have been reached only after administrative hearings have clarified the pipeline's cost picture. Such was the situation in each of the cases referred to by respondents in their Brief in Opposition. Thus, in *Northern Natural Gas Company*, F. P. C. Docket G-2505, 16 F. P. C. 803, where the Commission approved a settlement in July 1956 involving a rate increase originally filed two years prior in July 1954, the settlement was arrived at after hearings which had commenced in January 1956, six months prior to the settlement. The proceeding in *United Gas Pipe Line Company*, F. P. C. Op. No. 277, 13 F. P. C. —, had similarly been pending a number of years before any settlement was reached; in addition, it is significant that, while many of United's customers joined in that settlement, several did not. In these circumstances, it is hardly correct to say that "[n]egotiations looking to settlement of pending rate cases, in lieu of trial thereof, involve, of course, precisely the same process that would be involved in negotiating new rates prior to filing" (Br. in Opp. 21).

The common sense of the matter is that conference and settlement have operated and can operate to expedite the fixing of new gas rates only if the pipeline and its purchasers (direct and indirect) are willing

voluntarily to negotiate and resolve their disagreements on the various complex issues inherent in determining lawful rates for the pipeline. It is unrealistic, however, either to anticipate such cooperation in the absence of strong economic incentives on the part of all purchasers or to expect the resulting settlement to be generally just and reasonable unless the economic pressures on all parties are roughly equal. See *supra*, p. 90, fn. 56a. And while increased costs exert the requisite pressure on the pipeline, it oversimplifies the problem to suggest, as do respondents (Br. in Opp. 20, fn. 17), that the purchasers' needs for greater supplies of natural gas give the pipeline a comparable negotiating position for obtaining a rate increase. The purchasers' needs for additional supplies are not uniform nor do they necessarily coincide in time or economic pressure with the pipeline's need for an increase. On the contrary, when a rate increase is needed, some purchasers may want more gas and others may not; the result might very well be that an agreement would be reached with some purchasers and not with others. To permit higher rates with the agreeing customers might create an undue preference, rate-wise, in favor of the non-agreeing purchasers, contrary to the non-discrimination provisions of Section 4 (b) of the Act, *supra*, p. 86. Thus, when all customers are not equally under pressure to agree to increased rates, it would be difficult, if not impossible, to arrive at any agreement, particularly one which the Commission could accept as being in the public interest.

Moreover, even should the purchasers be willing to cooperate, they are not always free to do so, since

typically they are distributing companies whose rates are subject to regulation; the local regulatory agency may, as did the California Public Utilities Commission in its Decision 55902 of December 5, 1957, interpose obstacles to cooperation by directing the companies, which were subject to its regulation and purchased gas from El Paso Natural Gas Company, to " 'refrain from consenting, or manifesting any consent whatever' to El Paso's rate increase proposals"; and " 'prosecute diligently, vigorously and in good faith before the Federal Power Commission and the courts whatever legal rights they may have' derived from the *Memphis* ruling." See F. P. C. Opinion No. 308, *El Paso Natural Gas Company*, 19 F. P. C. 154 (issued January 24, 1958) (Reply Memo. for Federal Power Commission (on the petition for certiorari), App. 2a).

Finally, it must be remembered that, since major pipeline expansions are financed by long-term loans (*supra*, pp. 72-73), it is unreasonable to expect that lending institutions will generally be willing to provide funds of the magnitude required if the borrower's ability to obtain increases in revenues is dependent upon the weak reed of cooperation by purchasers and local regulatory commissions throughout the life of the loans, irrespective of changes in relative bargaining positions.

(c). Respondents further urge that the requisite rate flexibility can be obtained through proceedings under Section 5 (a) (Br. in Opp. 22-23). As we have pointed out (*supra*, pp. 56-57, 61-62), there is no provision in Section 5 (a) giving the pipelines a right to invoke that section or allowing increased rates to

become effective, subject to refund, pending the Commission's ultimate determination; the rates fixed in such a proceeding are effective only prospectively and only the old rate may be charged for gas delivered during the pendency of the proceeding. Respondents' argument therefore proceeds on the premises that the Commission will in each instance institute a Section 5 (a) proceeding upon the suggestion of a pipeline and that such a proceeding can be completed with sufficient expedition to prevent any substantial lag between the incurring of increased costs and the receipt of the additional revenues needed to cover these costs. That is a wholly unrealistic assumption."

Assuming *arguendo* that the Commission will institute a Section 5 (a) proceeding when so suggested

" Asserting that "in at least ten states and Hawaii rate increases may be made effective only prospectively, and after investigation and hearing," respondents argue that, since the utilities in those states are financially healthy, the pipelines would not be injured if they could obtain increases only under Section 5 (a) (Br. in Opp. 23). In *Mobile*, this Court noted as to the comparable attempt to invoke state analogies that "Taken as a whole, the state decisions prove little more than that the question is an open one and afford little guidance to the proper interpretation of the Federal Act" (350 U. S. at 347). Here, examination of the pertinent statutes and judicial decisions of the states cited by respondents shows that the situation in most of these states is, in reality, contrary to that asserted by respondents, and in fact the state practice underlines the need for the interim rate review authority granted the Commission by Section 4 of the Gas Act. In a number of states to which respondents refer, the regulatory commission has authority, either expressly or by implication, to authorize a temporary interim rate increase pending final administrative decision on rate applications. See *Re Southern California Gas Company*, 83 P. U. R. (N. S.) 564 (Cal. P. U. Com.); Michigan

by a pipeline, respondents' argument nevertheless fails to take into account the reasons why major rate proceedings under Section 5 (a), as well as those instituted under Section 4 (e), have required considerable time to complete. Apart from administrative reasons (including the limited staff available to process the relatively large number of such rate increases), the fact is that until now the Commission has not only been extremely careful to make certain that the rate increase ultimately allowed reflected only proper increased costs but has gone to great lengths to permit the intervening purchasers to have full opportunity to scrutinize the seller's evidence and present their conflicting views through their own experts. See *supra*, pp. 78-80. Since the sellers usually operate extensive pipeline systems ranging

Statutes Ann. (1957 Cum. Supp.), Section 22.13 (6a); see also Section 22.13 (6b); Ohio Rev. Code (1953) Section 4909.16; *City of Cambridge v. Public Utilities Commission of Ohio*, 150 Ohio St. 88; Wisconsin Stat. Ann., Sections 196.70, 196.395; *City of La Crosse v. Railroad Commission of Wisconsin*, 172 Wis. 233; see also South Dakota Code (1939), Section 52.0217. In other states, the courts have been quick to make judicial relief available where none could be given administratively. See, e. g., *Arizona Cooperation Commission v. Mountain States T. & T. Co.*, 71 Ariz. 404, where, although the elapsed time from the filing of the rate application to Commission denial was only six months, and lower court reversal of the administrative action followed within six months thereafter, the Arizona Supreme Court upheld the trial court's allowance of increased rates pending a new administrative determination and subject to bond for refunds (71 Ariz. at 408):

\* \* \* in view of the fact that the record showed the commission had failed for nine months after the company had applied for relief to grant any, and that the trial court had reasons to believe such a situation would continue for

through several states and make a number of sales, both jurisdictional and nonjurisdictional, it is necessary to resolve many difficult and complicated engineering, accounting, and economic issues, on which the parties and their experts may be in sharp disagreement, before an ultimate determination of costs and lawful rates can be made. In these circumstances, the preparation and presentation of the voluminous materials supporting each party's theories, and attacking the opposing theories, necessarily consumes a lengthy period of time.

During the period Order No. 144 has been in effect,

an unreasonable time and in fact has continued for almost a year *after* judgment, it is obvious that unless in *some manner* there was immediately established a temporary rate which the company might collect it would have been compelled long since either to operate for an indefinite time with insufficient revenue or to suspend operations during this period, with consequences to business and society in Arizona truly appalling.

See, also *Joy v. Winstead*, 70 Idaho 232; *City of Hutchinson v. Hutchinson Gas Co.*, 125 Kan. 346. The motivating force behind these interim rate increases pending final administrative determination appears to have been that, without such interim relief, the lengthy administrative lag not only might impair the utility's ability to render service but also might result in unconstitutional confiscation. See *Joy v. Winstead*, *supra*, at 241. Comment, *Validity of Temporary Rate Order*, 38 Mich. L. Rev. 72; cf. *Hope Natural Gas Co. v. Federal Power Commission*, 196 F. 2d 803, 809 (C. A. 4).

Finally, and of equal significance, eight of the nine states referred to by petitioner (Br. in Opp. p. 23, fn. 20) permit price escalation clauses in gas sales contracts, and we have noted *supra* that interim rate relief is available in the single exception, Kansas. See Report of the Rate Committee, American Gas Association, 1956-1957, pp. 13-14, 28 *et seq.*, 48 *et seq.*

Section 5 (a) proceedings not culminating in voluntary settlements (which constitute the great majority of those proceedings, *supra*, p. 90, fn. 56a) have averaged approximately 36 months in duration, with a range of between 73 months and 10 months. System-wide proceedings involving the rates of three major pipelines, Colorado Interstate Gas Company, Panhandle Eastern Pipeline Company, and United Gas Pipe Line Company, for example, have required an average of 62 months to complete. As just indicated, the length of these proceedings is not basically a reflection on either the Commission's procedures or industry cooperation, but rather reveals the complexity of the problems and the care with which these matters have been investigated.

Because of the long time-lag which such proceedings have entailed, restricting pipelines to *prospective* rate increases under Section 5 (a) would create a serious obstacle to their purchasing additional gas supplies, in view of the rising prices in the field. It would also constitute a deterrent to undertaking new construction demanded by growing consumer needs; since unit costs have almost invariably increased over similar costs in earlier periods, rates fixed upon such lower costs obviously would not be compensatory for the higher investment subsequently made. During the period of the Section 5 (a) proceedings, the pipelines would not be getting any of the benefit of that portion of the increased rate which the Commission ultimately holds to be justified. In a long hearing, the attrition in the company's position—currently incurring higher

costs, but unable to charge higher rates even though they prove to be justified—could be very substantial. See *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 236 F. 2d 606, 608 (C. A. 3).

In order to make any sizeable inroads into the time now required to complete a major Section 5 (a) rate proceeding, it would be necessary to have the cooperation of all parties. While the need for the increase might be counted on to compel the cooperation of the selling pipeline, the cooperation of each of the purchasers would depend upon the economic pressures to which each would be subjected. Since these pressures would vary from case to case and from purchaser to purchaser, expedited proceedings under Section 5 (a), like negotiated agreements, would fall far short of providing the generally needed assurance of revenues roughly keeping pace with costs. See *supra*, pp. 91-93.

Moreover, were the pipelines permitted to look only to Section 5 (a) for the necessary rate flexibility, the Commission would be under almost irresistible pressure to fix rates on estimates, rather than actual costs. Expedition of a Section 5 (a) proceeding would necessarily be at the expense of foregoing careful scrutiny of the cost figures supplied by the pipeline; and, in place of the actual test-year cost figures now required, the Commission would have to rely, at least in part, on estimates or projections in setting the lawful rate. There can be little dispute that a regulatory method which allows rates to be determined by actual costs, rather than by

forecasts or estimates, is preferable from the standpoint of consumers. For its own protection, a regulated utility's estimates of future costs will always err on the side of sufficiency, and there are limitations on the ability of the Commission's staff to review and appraise such estimates. Actual costs, however, cannot be easily gainsaid, and reliance upon them in rate proceedings greatly minimizes the chances of the consumer's having to pay an unjustified price for his gas. Consequently, even assuming that rates fixed on the basis of estimated costs would be sanctioned by the courts (but see *City of Detroit, Michigan v. Federal Power Commission*, 230 F. 2d 810 (C. A. D. C.), certiorari denied, 352 U. S. 829), there would be a substantial risk of inflated rates, contrary to the real interests of the consumers.

In sum, the effect of the holding below is to bar the pipelines from utilizing the means best calculated to give them the necessary rate flexibility while protecting the public interest, and to remit them to ineffective alternatives which will impair their ability to provide needed increases in gas service." Neither

"We pointed out in the petition for certiorari in No. 25 (No. 694, Oct. Term, 1957), and in the Commission's reply memorandum on the petition, that there was already at that time good reason to believe that the decision below would seriously interfere with pipeline expansion. As stated by the Commission in its Opinion No. 308, *El Paso Natural Gas Company* (issued January 24, 1958, 19 F. P. C. 154, 159) (Reply Memo., App., 11a):

There are already indirect effects flowing from the present uncertainties which are of importance. A number of

the Natural Gas Act nor the *Mobile* decision requires that result, which is at war with the Commission's long-established practice, will lead to grave inequities, will ultimately hurt the consumer instead of protecting him, and is wholly unnecessary to a proper and valid administration of the Natural Gas Act in the spirit Congress intended.

### III

#### UNITED'S SERVICE-AGREEMENTS WITH ITS PURCHASERS AUTHORIZED IT TO CHANGE RATES UNDER SECTION 4 (D) OF THE NATURAL GAS ACT

The court below accepted the Commission's finding, at least for the purpose of decision, that in the service-agreements here involved United's purchasers had consented to the filing of new rates under Section 4 (d). However, respondents seek to support the judgment below by urging as an alternative ground that the purchasers did not in fact agree to pay new rates filed under Section 4 (d) by virtue of the pricing provision of the service-agreements and hence that the agree-

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distribution companies have reported immediate uncertainties in their plans for expansion of natural gas service because their pipeline suppliers are uncertain as to their plans. Orders for new pipe, compressors, and other equipment and security issues have been cancelled or postponed. The postponement of expansion plans may not be of serious impact to many pipelines, but it is of grave concern to those areas where distribution companies have been and are making investments to render service which cannot be given without additional gas supplies and to pipeline equipment suppliers.

To a large extent, the passage of time has done little to remove this uncertainty.

ments did not recognize United's right under Section 4 (d) to file the new schedules. In respondents' view, the agreement embodied in the pricing provision was to pay only such new rates as might be determined by the Commission as the result of a proceeding instituted under Section 5 (a). See Br. in Opp. 15-18.

As we show *infra*, pp. 110-115, however, the overwhelming majority of gas purchasers, since the *Mobile* decision, have read their agreements, comparable to respondents', as permitting a seller-determined price. Further, the Commission has found against respondents; and since the issue is one of fact (or at most a mixed question of law and fact) involving the ascertainment of the intent of the parties to the agreement in the context of the particular circumstances of the natural gas industry—all of which are matters within the special knowledge and expertise of the Commission—the Commission's finding, which we shall show is reasonable and supported by substantial evidence, should be accepted here. *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 146; *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111, 130; *Cardillo v. Liberty Mutual Co.*, 330 U. S. 469, 477-478; *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, 303-304; cf. *United States v. Western Pacific Railroad Co.*, 352 U. S. 59, 64-67; *Far East Conference v. United States*, 342 U. S. 570, 573-575; *United States Navigation Co. v. Cunard S. S. Co.*, 284 U. S. 474.

A. *The terms and background of the pricing agreements.* The pricing provision, as noted *supra*, p. 7, reads as follows:

All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule [the appropriate rate schedule designation is inserted here], or any effective superseding rate schedules on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached thereto and filed with the Federal Power Commission which are by reference made a part hereof.

1. Nothing in this provision—which contemplates (as respondents implicitly concede) flexible rather than static rates over the life of the service-agreements—indicates an intention to cover only those rate changes made in proceedings initiated under Section 5 (a). On the contrary, the words “any effective” in the phrase “any effective superseding rate schedules on file with the Federal Power Commission” show an understanding by the parties that the purchasers were to pay *any* rate which could legally be made effective under any appropriate provision of the Act. This reading is fully supported by the phrase, in the following sentence, “such rate schedules”, obviously referring not to one fixed rate but to the “any effective superseding rate schedules” language.

To the weight of this broad language of the pricing provision should be added the following considerations. As shown *supra* in Point I, the Act authorizes rate changes not only as the result of a Commission investigation under Section 5 (a), but also by filing new schedules under Section 4 (d) and (e). In addition, as also shown *supra*, pp. 39-44, the tariff-and-service-

agreement method of rate making—pursuant to which these service-agreements were executed and filed and in the context of which the service-agreements should be read—provides that the executed service-agreements, on the one hand, and rate schedules, on the other, should be separate and distinct. It also contemplates that the rate schedules should be applicable not to individual customers as such but rather to the customers within the designated classes regardless whether they purchase gas pursuant to a service-agreement; and that changes in these general rate schedules would be initiated unilaterally by the pipeline. Since it was adopted and executed in this context, the pricing provision of United's service-agreements plainly manifested the parties' agreement that the purchaser's obligation included any rate placed in effect by a Section 4 (d) filing if and when it became effective, i. e., when allowed to go into effect by the Commission, subject to Commission review and suspension as provided in Section 4 (e)."

2. This construction of the pricing provision is fully consistent with respondents' view of the purpose

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"The fact that the new schedules are subject to the procedures prescribed in Section 4 (e) belies the implication of respondent Mississippi that the effect of the Commission's construction of the pricing provision would be "to give advance, *carte blanche*, agreement to any rate increase which United may at any time desire to make" (Br. in Opp. 16). On the contrary, our position is fully in accord with Mississippi's own view that the language encompasses an "agreement to pay new rates, if, as and when they become legally effective pursuant to valid exercise of the Commission's regulatory powers, whatever they might be" (*ibid.*).

of the service-agreements (Br. in Opp. 15), which was to make "certain that the purchaser must continue to buy from United the quantities provided for in the contract for the entire term, even if the Commission exercises its regulatory power to increase the rate thereunder". The filing of new schedules under Section 4 (d) has traditionally been recognized by the Commission and the natural gas industry as an accepted method for increasing rates. Consequently, to read the pricing provision as including revised rate schedules filed under that section would be fully in accord with this objective. In contrast, respondents' construction of the pricing provision as limited to Section 5 (a) rate changes would have the anomalous result that the provision would apply to some rate increases, not to others, despite the all-inclusive "any" in the terms of the provision and also despite the fact that United's interest in its customers' continuing obligation to buy the contract quantities of gas is the same regardless of the particular statutory authority for the rate increase.

Moreover, respondents' construction of the pricing provision would in fact virtually nullify this purpose. For at the time the service-agreements were prepared and executed, Section 5 (a) was regarded and used primarily, if not exclusively, as a vehicle for reducing, rather than increasing, rates. Since rate reductions diminish the pipeline's revenues and benefit its purchasers, it is the pipeline, not its purchasers, which might wish to terminate the sale. Under the pricing provision, however, it is the purchaser, not the pipe-

line, which agrees to continue the purchases notwithstanding changes in rates. In these circumstances, the pricing provision would have very little, if any, purpose or meaning if construed as applying only to rate changes under Section 5 (a).

This would be so even if the pricing provision were read as requiring the pipeline to continue its sales despite rate reductions. Independently of the contractual obligation which thus would be imposed upon it, a pipeline would not be free to terminate its gas sales; Section 7 (b) of the Act forbids such abandonment of service by a pipeline without Commission consent. Consequently, the "any effective superseding rate schedules" language of the pricing provision, as read by respondents, would at most constitute an agreement by the pipeline "to comply with the Act, and the orders of the Commission thereunder. Since [it is] under obligation to so comply and subject to penalties if [it does] not, such an interpretation would deprive the contractual provisions of meaning and substance" (R. 232).

3. That the pricing provision of United's service-agreement was intended to include rate filings by the pipeline under Section 4 (d) follows also, we believe, from the history and purpose of the proviso in Section 154.38 (d) (3) of Order No. 144, *infra*, p. 125. This provision permits the pipelines to reserve in their service-agreements the right to change rates upon compliance with the Act. As noted *supra*, pp. 73-76, the proviso was included in response to the vigorous complaints of the pipelines, including United, that the

Order as originally proposed (i. e., without the proviso)<sup>22</sup> would deprive them of the benefits of various price escalation provisions in their existing contracts, and would thereby affect substantive rights which could not be modified in a general rule-making proceeding. In these circumstances, and in view of the pipelines' own recognition of their need as a practical business matter to retain rate flexibility in order to adjust to future cost increases (see *supra*, pp. 71-75), it would be highly improbable, after the pipelines had gone to such lengths to persuade the Commission to permit them in their service-agreements to reserve the right to change rates, that they would enter agreements not providing for rate changes under Section 4 (d). Yet this would be the result of accepting respondents' reading of the provision here involved, since a substantial number of the pricing provisions of the service-agreements used by the pipelines are phrased in language which is the same or substantially similar to that used by United. And it would be particularly anomalous to attribute such an intent to United since its strenuous attacks upon Order No. 144 (see *supra*, p. 6, fn. 5, and p. 76, fn. 48b) demonstrated its awareness of the value of the escalation rights under its pre-Order No. 144 contracts and of the

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<sup>22</sup> As originally proposed, the rate schedules to be filed with the Commission were to include "(o)nly the rates and charges to be used in current billing" and the pipeline companies were prohibited from including "in the rate schedule or any other part of the tariff", including the service-agreement forms, any provision for "price adjustments or periodic changes \* \* \* which in any way purports to effect the modification or change of any rate or charge specified in the rate schedule" (Section 154.38 (d) (1), (3), *infra*, pp. 124-125; see 13 Fed. Reg. 5216).

right to change rates as allowed by the proviso ultimately inserted in the Order.

The incongruity in the construction advanced by respondents is also highlighted by the fact that the pricing provision closely adheres to the language and format of Order No. 144. Section 154.14 of that Order (18 C. F. R. 154.14), *infra*, p. 123, defines "tariff or FPC gas tariff" as a "compilation, in book form, of all of the *effective rate schedules* of a particular natural-gas-company" (emphasis added). "Effective tariff" is further defined in Section 154.21 (18 C. F. R. 154.21), *infra*, p. 123, as a "tariff filed pursuant to the requirements of this part, and permitted by the Commission to become effective." By thus echoing the Commission's Order, the parties indicated that the contractual phrase should be read in the light of and in conjunction with the Order. And, since the Order contemplated that a natural gas company may in its service-agreements retain the power to change rates which would become effective by filing new schedules under Section 4 (d) (see *supra*, pp. 73-76, *infra*, pp. 110-115), it follows that the pricing provisions in these service-agreements similarly extended to such rate changes.

4. Respondents have also argued before this Court (Br. in Opp. 14-15), although not to the court below, that, since United had originally included in its tariff-and-service-agreement forms a more express provision permitting it to change rates unilaterally, its proposal of this express provision shows that the "any effective superseding rate" language in the agreements was in-

tended to be restricted to rates set by the Commission in proceedings under Section 5 (a). This proposal was deleted at the suggestion of the Commission.

It should be noted that the Commission requested only that this language relied upon by respondents (R. 283-284) be deleted from United's original conversion tariff, not from its service-agreement forms, because inclusion of the escalation provision in the tariff terms and conditions would have violated Order No. 144.<sup>50b</sup> The Commission's letter stated (R. 283-284):

Section 13.1 of the proposed Tariff, General Terms and Conditions, contains a rate escalator provision. The inclusion of this escalator clause in the General Terms and Conditions is in contravention of Section 154.38 (3) of the Commission's rules which prohibits such provision in the "rate schedule or any other part of the tariff," but permits the inclusion "in the service agreement \* \* \* that it is or will be" a natural-gas company's "privilege, under certain specified conditions, to propose to the Commission a modification, change or substitution of the then effective rate or charge."

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<sup>50b</sup> The effect of including an escalation provision in the tariff general terms and conditions would have been to have included it in all of United's sales agreements, both negotiated service-agreements and preexisting contracts. Order No. 144 permitted such provisions in negotiated service-agreements provided that it was made clear that the rate increases were subject in every case to Commission review. However, Order No. 144, as its preamble makes clear (13 F. R. 6371), was not intended to permit modification of pre-existing contracts which had not previously contained escalation provisions, except by agreement between the parties.

The Commission has not accepted for filing any rate schedules or tariffs filed pursuant to Part 154 of its present rules which contain proposals for the adjustment of rates by reason of escalator provisions where such proposals, contrary to the prohibitions contained in the rules, have been included in the rate schedule or general terms and conditions. The Commission has accepted for filing tariffs where proposals respecting adjustment of rates by reason of rate escalator provisions are reflected in the form of service agreements only as permitted by the Commission's rules.

United's letter resubmitting its tariff (R. 289-290) shows that it decided to remove the language from its service-agreement forms, as well as from its tariff, because it was doubtful as to whether the Commission would accept the language included in the forms without further revision," and United wished to avoid additional delay in placing its rate schedules on file. Since United had consistently claimed since 1948 that the right to make escalated changes was an absolute necessity, *supra*, pp. 74-76, Appendix B, *infra*, p. 132, its action here is consistent only with the hypothesis that it regarded the more detailed lan-

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"The language employed by United was also objectionable in stating that the "Seller shall have the right to revise its rate" (R. 289) instead of the customary phrase "seller shall have the right to file revised rate schedules". Although the provision also stated that the revised rates were subject to Commission action, United's language at least left the way open for the claim that it barred the purchaser from challenging the reasonableness of the rates before the Commission, contrary to the Commission's intention in Order No. 144, and to public policy.

guage excluded by the Commission as unnecessary because it had already reserved the right to file unilaterally, by providing that its sales would be governed by "any effective superseding rate schedule."<sup>202</sup>

**B. General interpretation of service-agreement pricing provisions.**

1. Any doubts as to the proper reading of the service-agreement language in this case are fully dispelled, we submit, by the uniform interpretation given that language, following this Court's *Mobile* decision, by every part of the gas industry.<sup>203</sup> Following

<sup>202</sup> In view of United's strenuous attack on the proposed Order No. 144, *supra*, pp. 6, 73-76, *infra*, pp. 129-132, a short time earlier, on the ground that it modified existing contract escalation provisions (an objection which the provisos of Order No. 144 were designed to meet, *supra*, pp. 73-75), it certainly cannot be said that United was indifferent to its escalation rights.

<sup>203</sup> That many of these agreements were made prior to *Mobile*, when the Commission thought the Gas Act allowed a pipeline to change its rates without regard to its contract prices, can have no bearing on their present meaning or validity. Since, as we have shown in Point I, *supra*, the agreements are not prohibited by the Act, the fact that some purchasers may at the time of execution have been under a misapprehension as to the applicable law cannot now nullify the agreements, any more than it could have the effect of invalidating the Commission's regulations requiring the filing of uniform rate schedules or tariffs. That the purchaser companies recognized this themselves is clear from the fact that, following *Mobile*, they have continued to execute new service-agreements containing the same or equivalent language pursuant to the Commission regulations, when there could no longer have been any doubt as to a pipeline's disability to set rates wholly independently of its customer's wishes. See the text, *infra*. Moreover, we have shown that prior to *Mobile*, many pipelines did not regard themselves as free to increase rates without regard to the terms of the contracts with their purchasers. See *supra*, pp. 74-75; Appendix B, *infra*, pp. 129-132.

*Mobile*, there could no longer be any doubt that a pipeline could not modify a fixed-price contract absent purchasers' consent. Nevertheless, between the date of the *Mobile* decision and the decision below (a period of approximately 22 months), 32 pipe line companies had filed with the Commission new rate schedules increasing their rates, all of which were suspended and set for hearing by the Commission. The service-agreements of nine of these companies contained a price provision identical with that employed by United here." Although these nine companies make direct sales to approximately 300 gas purchaser customers whose rates were raised by these filings, only *one* such customer filed motions to dismiss in suspension proceedings involving these rate increases on the ground that the pipeline's prior rate schedule had been superseded without its customers' express consent to the new rate." Including the present proceedings, only three direct customers,<sup>100</sup> in total, out

<sup>99</sup> The service-agreements of 22 of the other companies (all but one of the remaining 23) contained pricing provisions phrased in equivalent language.

<sup>100</sup> Significantly, these motions were filed by counsel for the present respondents, there acting on behalf of Citizens Utilities Company in opposition to rate increases sought by Colorado Interstate Gas Company in Docket Nos. G-2260, G-2576 and G-11717. A similar motion was filed against the rate increases by the Public Utilities Commission of Colorado, which is not a customer of Colorado Interstate nor a party to its service-agreement.

<sup>101</sup> These three customers were Citizens Utilities Company, the respondent Mississippi Valley Gas Company, and Willmut Gas and Oil Company. Motions to dismiss were also filed in the proceedings below by respondent Memphis Light, Gas and Water Division, an indirect customer of United's, and by two municipalities, the respondent City of Memphis, and the City of Jackson, Mississippi. See *supra*, p. 10.

of the approximately 600 served directly by the 32 companies filing rate increases during the period here in question, moved to dismiss a rate schedule on the ground that the act of filing was not sanctioned by their service-agreements." Yet a substantial percentage of these customers have intervened in the Commission proceedings under Section 4 (e) to contest the reasonableness of the increase.

We believe that from these facts only one conclusion is possible—the overwhelming majority of customers purchasing gas under service-agreements containing the language here in question interpret that language as giving their seller a right, unaffected by *Mobile*, unilaterally to file rate changes, subject to Commission review (the purchasers retain, of course, the right to challenge the reasonableness or lawfulness of any increase before the Commission).

2. The conduct and actions of the parties to the present proceeding equally leave no doubt that United's purchasers regarded their agreements as permitting United initially to set rates. In this connection, it is noteworthy that neither respondent Memphis Light, Gas and Water Division nor respondent City of Memphis is itself a party to these agree-

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<sup>66</sup> The City of Corinth, Mississippi, has also challenged a pipeline rate increase by a motion for rehearing of a Commission order in Docket No. G-11982 placing the increase in effect subject to refund, without intervening in or moving to dismiss the proceedings (*City of Corinth v. FPC*; petition for review pending, C. A. 5, No. 16,956). In addition, a number of motions to dismiss have been filed since the date of the decision below, which obviously have no bearing on the parties' original interpretation of their agreements.

ments; the Division makes no direct purchases from United, but rather purchases gas from Texas Gas, which is a party to such an agreement, and the City of Memphis apparently regulates the price at which the Division resells gas locally (R. 119, 120-121). See *supra*, p. 9, fns. 11, 12. It is also significant (1) that United sells gas to 47 purchasers, with whom it has entered into service-agreements and (2) that the rate proceedings in which respondents' motions to reject the filed increases were made (*supra*, pp. 8-10) concerned company-wide rate increases, and at least 22 parties representing distributing companies and ultimate consumers as well as other pipeline companies purchasing gas from United had intervened. Notwithstanding respondents' filing of their motions to reject, the overwhelming majority of these interested and affected parties did not adopt respondents' view by filing similar motions with reference to the sales made, directly or indirectly, to them; only three similar motions were made. See fn. 62a, *supra*, p. 111. In these circumstances, it is reasonable to conclude that most of these interveners joined in the understanding expressly noted by Southern and by Texas Gas, which were parties to the agreements involved in respondents' motions and hence in a position formally to present their views, that the service-agreements *did* permit United to change its rates, subject to Commission review (R. 168-169, 171-172, 173-174). It is also significant that Mobile, the distributor involved in the *Mobile* case, does not now

contend " that United may not change rates governing sales to it which are incorporated by reference in the

" It will be recalled (see *supra*, pp. 25-27) that the original United-Mobile contract of 1936 (FPC Gas Rate Schedule No. 20) had been amended in 1946 to provide for a minimum rate of 16¢ per Mcf covering Mobile's general purchases for industrial resale. Simultaneously with this agreement, the parties had also agreed by letter to reduce the price of gas resold by Mobile to the Ideal Cement Company to approximately 10.7¢ per Mcf for a ten year period. In July 1952, United filed a conversion tariff covering its entire system, pursuant to Commission Order No. 144, *supra*, which restated rates for gas sold to Mobile for industrial resale generally at 14.5¢ per Mcf (IND-4J, Original Sheet No. 45), but preserved the special price contract involving the Ideal resale by restating it in a rate schedule applying only to this sale, at the same 10.7¢ per Mcf rate (IND-3J, Original Sheet No. 43). United and Mobile did not at that time enter into a service-agreement but continued the former contract with its price terms restated, in accordance with a statement filed by United with the Commission under Order No. 144. (See No. 17, 1955 Term, R. 76-94, 111-158).

About a year later, in June 1953, United filed new schedules merging the schedule for the Ideal resale into its general industrial resale schedule (IND-J, second Revised Sheet No. 39) at 14.5¢ per Mcf, which caused an increase in the price of the Ideal gas of approximately 3½¢ per Mcf. The new schedules also raised the price of Mobile's domestic service gas approximately 2¢ per Mcf, to 25¢ per Mcf base (16.5¢ per Mcf in excess of base amount; DG-J, First Revised Sheet No. 6) over the price contained in the conversion tariff. Mobile challenged the legality only of the increase in the Ideal resale gas, not of the increase in its domestic service rate.

Following filing of United's settlement tariff in December 1954, which restated the rates for all of United's Mobile sales (except for the Ideal resale which was then in litigation), Mobile and United entered into a service-agreement covering all of Mobile's gas requirements entirely superseding the old contract (R. 232). This service-agreement, which is in the form involved in the present case, states that "All gas delivered hereunder shall be paid for by buyer under Seller's Rate Schedule

service-agreement here in question, but which are not covered by pre-existing price contracts."

DG-J, or any effective superseding rate schedules, on file with the Federal Power Commission."

United has since filed several rate increases covering gas sold under Schedule DG-J, and although Mobile has attacked the reasonableness of the increase sought, it has not challenged the legality of such filings (See R. 232-233).

"Two of the seven agreements involved here, as stated *supra*, pp. 7-8, were in the form of pre-existing contracts between United and Texas Gas and Southern Natural, respectively. The price term of these contracts, as the Commission found, had been superseded by United's uniform rate schedule applicable to the particular sales, but since the contracts had not been converted into service-agreements they did not contain the "any effective superseding rate schedule" language. The Commission found, however (R. 233-234, 247), that the parties by their subsequent conduct evidenced an understanding that United's rights under these contracts to set unilateral rates were fully the equivalent of its rights under its service-agreements, so that the pertinent language was necessarily read into the contracts by the contemplation of the parties. None of the parties to the contracts has questioned that this was in fact their understanding of their pre-existing contracts.

Since there is no disagreement among the particular contract signatories as to the proper interpretation of these two contracts and there was no evidence presented to support another reading, the Commission was fully justified in its construction of these contracts. It should be pointed out, however, that out of the 1,100 existing service-agreements, *supra*, p. 6, the 80 special contracts now in effect with price terms restated are not uniform and the rights of the parties thereunder will depend on the terms of each individual contract and the underlying circumstances. Other sellers may not have acquiesced in the restatement of their pre-existing contracts. See *Tyler Gas Service Corp v. Federal Power Commission*, 247 F. 2d 590 (C. A. D. C.), certiorari denied, 355 U. S. 895.

## CONCLUSION

For these reasons, it is respectfully submitted that the judgment below should be reversed, and the Commission's orders affirmed.

J. LEE RANKIN,  
*Solicitor General.*

WILLARD W. GATCHELL,  
*General Counsel,*

WILLIAM W. ROSS,  
*Attorney,*  
*Federal Power Commission.*

AUGUST 1958.



## APPENDIX A

1. The Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U. S. C. 717, *et seq.*, provides, in pertinent part, as follows:

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to

such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for

the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. \* \* \*

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by

order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

\* \* \* \*

SEC. 7. (b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

\* \* \* \*

SEC. 15. (a) Hearings under this act may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

\* \* \* \*

**SEC. 19. (b)** Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. \* \* \*

2. Order No. 144, issued by the Federal Power Commission pursuant to the Natural Gas Act, insofar as pertinent, provides (18 CFR 154.1, *et seq.*):

#### **154.11 Rate schedule**

The term "rate schedule" means a statement of a rate or charge for a particular classification of transportation or sale of natural gas subject to the jurisdiction of the Commission, and all terms, conditions, classifications, practices, rules and regulations affecting such rate or charge. This term also includes any con-

tract for which special permission has been obtained in accordance with § 154.52.

#### **154.12 *Contract***

The term "contract" means any agreement which in any manner affects or relates to rates, charges, classifications, practices, rules, regulations or services for any transportation or sale of natural gas subject to the jurisdiction of the Commission. The term includes an executed service agreement.

#### **154.13 *Service agreement***

The term "service agreement" means an unexecuted form of agreement for service under a natural-gas company's tariff.

#### **154.14 *Tariff or FPC gas tariff***

The term "tariff" or "FPC gas tariff" means a compilation, in book form, of all of the effective rate schedules of a particular natural-gas company, and a copy of each form of service agreement.

#### **154.21 *Effective tariff***

The effective tariff of a natural-gas company shall be the tariff filed pursuant to the requirements of this part, and permitted by the Commission to become effective. No natural-gas company shall directly or indirectly, demand, charge or collect any rate or charge for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, or impose any classifications, practices, rules or regulations, different from those prescribed in its effective tariff and executed service agreements on file with the Commission, unless otherwise specifically provided by order of the Commission.

#### **154.34 *Composition of tariff***

(a) The tariff shall contain, in the order named, sections setting forth a table of contents, a preliminary statement, a map of the

system, the rate schedules, general terms and conditions, form of service agreement and an index of purchasers: *Provided, however, That rate schedules for which special exception has been obtained under § 154.52 may be filed in a separate volume as permitted by § 154.33.*

(b) Rate schedules shall be grouped according to class and numbered serially within each group, using a letter before the serial number to indicate the class of service. For example, G-1, G-2 may be used for general service; CD-1, CD-2 for contract demand service; I-1, I-2 for interruptible service; T-1, T-2 for transmission service; X-1, X-2 for schedules for which special exception has been obtained.

#### 154.38 *Composition of rate schedule*

The sheets of a rate schedule shall contain a statement of a rate or charge and all terms and conditions governing its application, arranged as follows:

\*            \*            \*            \*

(d) *Statement of rate.* (1) Except as permitted in §§ 154.52 and 154.82, all rates shall be clearly stated in cents or in dollars and cents per unit. Only the rates and charges to be used in current billing shall be included in the rate schedules.

(2) A rate having more than one part shall have each part set out separately under appropriate headings such as: Demand Charge, Commodity Charge, etc. The minimum bill and other provisions affecting charges shall not be included in this paragraph, but shall be included in subsequent paragraphs.

(3) No rule, regulation, exception or condition such as tax, commodity price index, wholesale price index, purchased gas cost adjustment clauses or other similar price adjustments or periodic changes shall be included in the rate schedule or any other part of the tariff which in any way purports to effect the modification

or change of any rate or charge specified in the rate schedule, or the substitution therefor of any other rate or charge: *Provided, however*, a natural-gas company may state in the service agreement or in rate schedules filed pursuant to § 154.52 that it is or will be its privilege, under certain specified conditions, to propose to the Commission a modification, change or substitution of the then effective rate or charge: *Provided further*, That no such clause may effectuate a change in an effective rate or charge except in the manner provided in section 4 of the Natural Gas Act, as amended, and the regulation in this part:

\* \* \* \* \*

**154.40** *Composition of service agreement*

There shall be submitted as part of the tariff an unexecuted copy of each form of service agreement. The service agreement forms should provide for insertion of such items as the name of the purchaser, service to be rendered, area to be served, maximum obligation to deliver, delivery points, delivery pressure, applicable rate schedules by reference to the tariff, effective date and term, and identification of any prior agreements being superseded.

**154.52** *Exception to form and composition of tariff*

(a) Upon application and for good cause shown, the Commission may permit special rate schedules to be filed in the form of an agreement in the case of special operating arrangements such as for exchange or transportation of natural gas; or for the sale of gas at charges computed on a cost-formula basis, which charges need not be stated in cents or in dollars and cents per unit. Such rate schedules shall conform to the form, type and size specified in § 154.32 and shall contain on each sheet the marginal notation specified in § 154.33. In addition each such rate schedule shall contain

a title page which shall show its designation, the parties to the agreement, the date of agreement and a brief generalized description of services to be rendered. Such rate schedules shall not contain any supplements. Any modifications shall be by revised or insert sheets.

(b) Such rate schedules may be included in a separate volume of the tariff, which shall contain a table of its contents. This table of contents shall also be incorporated with the table of contents of other volumes.

**154.62 *Material submitted with initial rate schedule or executed service agreement***

\* \* \* \*

(b) (3) *Basis of the rate or charge proposed in initial rate schedule.* A statement shall be submitted explaining the basis used in arriving at the proposed rate or charge. Such statement shall clearly show whether such rate or charge results from negotiation, cost of service determination, competitive factors, or others, and shall give the nature of any studies which have been made in connection therewith. If all or any portion of such information has already been submitted to the Commission, specific reference thereto should be made.

**154.63 *Material submitted with changes in a tariff, executed service agreement or part thereof***

\* \* \* \*

(b) (3) (ii) *Preparation for hearing.* A natural gas company filing for an increase in rates or charges shall be prepared to go forward at a hearing on reasonable notice and sustain the burden of proof imposed by the Natural Gas Act of establishing that its proposed changes are just and reasonable and not unduly discriminatory or preferential.

\* \* \* \*

#### **154.82 Requirement for restatement**

All effective schedules of rates, charges, classifications, practices, regulations, and contracts not prepared in accordance with §§ 154.31 through 154.41 shall be restated and filed as parts of a Tariff in accordance with said sections on or before the dates specified in § 154.83 and duly posted at the time of filing: *Provided, however,* That price provisions which cannot be restated in cents or in dollars and cents per unit, as required by § 154.38 (d), without effecting a change in rates or charges may be retained in effect without change: *Provided, further,* That when necessary, pending completion of restatement within the time provided for by § 154.83, schedules may be filed in accordance with this part as in effect prior to December 1, 1948.

#### **154.84 Plan of restatement**

The restatement shall contain the provisions of schedules of rates, charges, classifications, practices, regulations and contracts effective on the date the tariff is filed. However, concurrent with the restatement, a natural-gas company may propose changes in rates, charges, classifications, services, practices, rules and regulations in accordance with § 154.63 of this part. Differences in the phraseology of schedules should be reconciled whenever possible. The effective date to be shown on the tariff sheets shall be that desired by the company, but not less than 30 days nor more than 60 days after filing pursuant to § 154.83.

#### **154.85 Status of contracts filed as rate schedules and restated**

Each contract, which is now filed as an effective rate schedule, may be continued in effect and shall be considered as an executed service agreement to the extent that the provisions thereof are not superseded by or in conflict with other applicable provisions of the rate schedules and

general terms and conditions of the tariff, until such contract expires by its presently provided terms or is replaced by an executed service agreement in a form contained in the tariff: *Provided, however,* That the natural-gas company, concurrent with the filing of the tariff, shall submit, for insertion in front of each such contract, a statement identifying the provisions thereof which are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff and which are to remain in effect: *Provided further, however,* That agreements intended to effect a change or amendment in such contract may be made only by the execution of a form of service agreement contained in the tariff.

## APPENDIX B

### INDUSTRY VIEWS, PRIOR TO ORDER NO. 144, ON THE POWER OF A PIPELINE COMPANY UNILATERALLY TO CHANGE A RATE IN A FIXED-PRICE CONTRACT

Prior to the issuance of Order No. 144 in 1948, there was a substantial body of opinion in the natural gas industry that a pipeline company would not have the power to change, by a filing under Section 4 (d) of the Natural Gas Act, rates which had been previously set in a fixed-price contract. In the Commission proceedings on the then proposed Order No. 144, counsel appearing for twenty-three pipeline and distributing companies opposed the proposed order which at that time would have forbidden the pipeline companies from including in their rate schedules any provision for "price adjustments or periodic changes . . . which in any way purports to effect the modification or change of any rate or charge specified in the rate schedule"—and thus would have modified existing contracts in this respect. The proposed order did not contain the further provision appearing in the Order as finally promulgated authorizing the pipelines to reserve in their service-agreements the right to file new rates under Section 4 (d) of the Act.

In objecting on this and other grounds that the proposed order would substantially modify contract rights without according them the requisite hearings with opportunity to present evidence and cross-examine witnesses, counsel for these companies stressed at length their view that the Act did not authorize the Commission to alter contract rights other

than in an appropriate hearing under Section 5 (a). In accordance with this view, Mr. Charles V. Shannon, one of the companies' counsel, after detailing the various provisions of Sections 4 and 5, described Section 5 (a) "as being the one and only authority of the Federal Power Commission to change the provision of either an existing contract or a new contract, even though the new contract effects a change in a filed schedule" (see *United Gas Pipe Line Co. v. Federal Power Commission*, No. 216, Oct. Term 1950, Record at p. 123<sup>1</sup>). Mr. Shannon continued (*id.* at p. 124):

This statutory scheme, I believe, clearly indicates the intention of Congress—one, that contracts in existence at the time the Act was passed would remain in existence. They would be filed with the Commission but they would remain in existence until the Commission, after a hearing under Section 5 (a) should find any provisions of that contract was contrary to law because of its being unfair or unreasonable. Secondly, that Congress intended that the responsibility in the first instance for making arrangements, that is further new arrangements, concerning the transportation and sales of natural gas was to be left with the industry subject to this Commission's review of those arrangements after notice, opportunity for hearing, and if the Commission finds that any such arrangement is contrary to the public interest and that finding is made and supported by evidence, then that provision can be set aside.

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<sup>1</sup> This *United Gas Pipe* case involved an effort by United and Michigan Consolidated Gas Company to obtain review of Order No. 144. See, *supra*, p. 6, fn. 5. The record in the case, accordingly, contains the Commission proceedings on that Order.

Subsequently, Mr. Shannon summarized the objecting companies' position as follows (*id.* at p. 134):

If the Commission is proceeding upon the assumption—I preface this with an “if”—if the Commission is proceeding upon the assumption that the Commission has authority, or that the Commission by merely accepting an *ex parte* filing by a pipeline company can effectively modify that company's obligation under filed contract, I submit that the Commission is proceeding on an erroneous view of its authority under the statute.

In support of this view, he cited to the Commission, *Wichita Railroad & Light Company v. Public Utilities Commission of Kansas*, 260 U. S. 48, a decision which this Court referred to in *Mobile* as constituting “strong support for our interpretation of the Natural Gas Act” (350 U. S. at 346).

This view was apparently then shared by all but one of the companies represented, which included many of the major companies in the industry. Counsel for that company, Mr. John L. Yost representing Panhandle Eastern Pipe Line Company, appeared specially to express the contrary view. See No. 216, Oct. Term, 1950, R. at pp. 152–157. This disagreement was further manifested when, in the brief filed on behalf of Michigan Consolidated Gas Company in the Court of Appeals for the District of Columbia Circuit in connection with its petition for review of Order No. 144, Mr. Shannon stated:

Oral argument was held on September 20, 1948 and counsel for the several interested parties, including Michigan Consolidated, were heard in support of the objections set forth in the motions (app., pp. 96–226).

However, during such argument, counsel for one company—Panhandle—erroneously contended that the Natural Gas Act gives a pipeline company the “right” to make any change it may desire in its effective rate schedules and existing contracts by merely filing a supplement thereto with the Commission; that it is not necessary for the other party to such contracts to consent to such changes; that, unless suspended by the Commission within the 30-day period prescribed in Section 4 (e) of the Act, such changes go into effect; and that whether the change will be suspended and a hearing held with respect thereto is “wholly discretionary with this Commission” (App., pp. 153-157).<sup>2</sup>

In this connection, it is noteworthy, in addition, that United Gas Pipe Line Company, the company involved in the *Mobile* case, was one of the companies then disagreeing with the Commission's reading of Section 4 (d) in the proceedings on Order No. 144. See Brief for petitioner in *United Gas Pipe Line Co. v. Federal Power Commission*, C. A. D. C., No. 10125, at pp. 15-31 and *supra*, pp. 74-76.

In sum, the natural gas industry was not in agreement as to the existence of the right to change contract rates by unilateral filings under Section 4 (d), with a substantial segment thinking that no such right existed.

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<sup>2</sup>Brief for Petitioner in *Michigan Consolidated Gas Co. v. Federal Power Commission*, C. A. D. C. No. 10126, at p. 7. The Commission, of course, disagreed with Mr. Shannon's view; see Brief for Respondent in C. A. D. C. No. 10126, at fn. 28, pp. 48-50.

## APPENDIX C

The provisions of Section 4 and Section 5 (a) of the Natural Gas Act (Appendix A, *supra*, pp. 118-122) pertinent to this proceeding are set forth in columns paralleling the provisions of Part I of the Interstate Commerce Act (49 U. S. C. § 1, *et seq.*) from which they derive:—

### INTERSTATE COMMERCE ACT (Part I)

#### Section 6 (1):

That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route \* \* \* and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. \* \* \*

### NATURAL GAS ACT

#### Section 4 (c):

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect such rates, charges, classifications, and services.

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**INTERSTATE COMMERCE  
ACT**

**Section 6 (3):**

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; \* \* \*

*Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions \* \* \*

**NATURAL GAS ACT**

**Section 4 (d):**

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

## INTERSTATE COMMERCE ACT

### Section 15 (7):

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regu-

## NATURAL GAS ACT

### Section 4 (e):

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months . . . and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would

## INTERSTATE COMMERCE ACT

## NATURAL GAS ACT

lation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and de-

be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing the proposed change of rate, charge, classification or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of

## INTERSTATE COMMERCE ACT

## NATURAL GAS ACT

cision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amount were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involved a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

### Section 15 (1) :

That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Com-

proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

### Section 5 (a) :


Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find

## INTERSTATE COMMERCE ACT

mission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, \* \* \*

## NATURAL GAS ACT

that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. \* \* \*



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**Nos. 23, 25, and 26**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1958**

**UNITED GAS PIPE LINE COMPANY, FEDERAL POWER  
COMMISSION, TEXAS GAS TRANSMISSION CORPORATION,  
AND SOUTHERN NATURAL GAS COMPANY, PETITIONERS**

**v.**

**MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.**

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**REPLY BRIEF FOR THE FEDERAL POWER COMMISSION**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
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## **REPLY BRIEF FOR THE FEDERAL POWER COMMISSION**

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We believe that most of respondents' arguments are already answered adequately in the Government's main brief, as well as in the briefs of the other petitioners. In view of the importance of the case, however, further brief discussion of some of respondents' principal contentions is appropriate.

Before turning to these contentions, we shall make one general preliminary comment. Throughout their brief, respondents have repeatedly misapprehended the Commission's position and then addressed their response to these strawmen. Thus, respondents do not

deal with the Commission's actual arguments, and yet may give the appearance of answering them. Since it would be impracticable for us to treat with each such misconception without unduly extending the length of this reply brief, we respectfully suggest that the Court compare respondents' formulation of the Government's arguments with the actual argument as made in our main brief.<sup>1</sup>

## I

UNDER SECTION 4 OF THE NATURAL GAS ACT, AS INTERPRETED IN THE *MOBILE* DECISION, THE COMMISSION PROPERLY ACCEPTED FOR FILING UNITED'S CHANGED RATES

Respondents' entire statutory argument (Resp. Br. 20-48) is grounded on the basic error that the *Mobile* decision (*United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332) held that a pipeline could not avail itself of the rate-filing mechanism of Section 4 of the Natural Gas Act if it had a contract, *of any type*, with its purchaser.<sup>2</sup> But it is plain that *Mobile* held no such thing; it held only that Section 4 was unavailable if the parties' contract incorporated a fixed price, *without any provision for modification of prices*. The crucial factor was not the mere existence of a contract between *Mobile* and *United*; the crucial factor was the rigid fixed price incorporated in that contract. This Court's decision

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<sup>1</sup> Compare, e. g., Resp. Br. 9, fn. 8 with Govt. Br. 115, fn. 65; Resp. Br. 43 with Govt. Br. 39-48; Resp. Br. 44 with Govt. Br. 39; Resp. Br. 59, fn. 33 with Govt. Br. 110-115; Resp. Br. 61 with Govt. Br. 109; Resp. Br. 77, fn. 46 with Govt. Br. 94, fn. 57; Resp. Br. 84 with Govt. Br. 6, fns. 6, 7.

<sup>2</sup> Unless the purchaser specifically agreed to the precise rate increase to be filed.

turned on that fixed-price provision, and the opinion makes clear that the decision would have been different if the parties had included a provision for changing prices in the contract. If respondents had recognized that the holding of *Mobile* was squarely based on the critical factors of a fixed price plus the absence of a provision for changing prices, they could not have made the arguments they do.

1. We have shown at length (at pp. 24-38) in our main brief that the Court of Appeals misread *Mobile* by failing to recognize that the Natural Gas Act, in preserving contracts between gas companies and their purchasers, did not affect, by subtraction or by addition, the gas companies' contractual rights against their purchasers, and consequently that the Act did not impose any limitation upon the sellers' rights, under general contract law, to reserve in their contracts a power to change rates without further assent of the purchasers.<sup>5</sup>

<sup>5</sup> In attempting to support the view of the court below—that where the gas is sold under a contract the purchaser must also agree to a new rate before it may be filed under Section 4 (d), irrespective of the terms of the contract—respondents argue that, where the contract preserves the pipeline's power to change rates (which the purchasers could oppose), it attempts improperly to vest arbitration jurisdiction in the Commission (Resp. Br. 24-28, 38-39). This thesis, together with the subsidiary contention that rates filed by a company under such a contract are not actual rates but rather rate "proposals" (Resp. Br. 2, 7-8, 24-28), is based almost entirely upon chance statements by the parties in this and earlier proceedings, never adopted by the Commission and wholly irrelevant to the case in its present posture. As we have shown in our main brief (at pp. 49-54), neither premise has any substantive or factual validity. The new rates are in fact actual rates and the Commission was exercising the rate review function vested in it by Section 4 (e), after having per-

Respondents' analysis of *Mobile* leads them to the singular conclusion that "[u]nder no circumstances, however, may changes in contract rates *be established unilaterally by a seller*" (Resp. Br. 35, emphasis in original), and that "there is no authorization in the Act for the Commission to establish a rate-making system which *empowers* the companies to make and change their contract rates *ex parte*" (Resp. Br. 47, emphasis in original). This amounts to the contention that the mere fact of contractual relations between the parties, rather than the *terms and conditions* of the agreement, determines whether a gas company may file new rate schedules without the purchasers' assent to the exact price. Such a position ignores the entire thrust of *Mobile*, exemplified by the very language which respondents not only reproduce, but do so in italics, *i. e.*, "If the purported change is one the natural gas company has the power to make, the 'change' is completed upon compliance with the notice requirement" (Resp. Br. 32-33; 350 U. S. at 342). This language, together with the remainder of the *Mobile* opinion (see our main brief at pp. 24-39), demonstrates that a gas company's right to change rates, if it has any such right, is to be determined solely by reference to the terms and conditions of its arrangements (contractual or otherwise) with its purchasers. If those terms and conditions permit a filing under Section 4, the seller may make such a filing—otherwise not. The Act does not prohibit the parties from agreeing that the seller can file changes.

mitted the purchasers to intervene and participate in the administrative proceeding under the "public interest" intervention provisions of Section 15 (a) of the Act.

2. Respondents also contend that United's filings were unlawful because the agreement by its purchasers to pay whatever rate was filed with the Commission subject to the Commission's review powers under Section 4 (e) is invalid apart from the Natural Gas Act, and hence no agreement at all. Assuming *arguendo* that this contention is relevant,<sup>4</sup> it is clear that such an agreement is valid and binding under general contract law, particularly since the Commission's practice of reviewing virtually all pipeline rate increases makes the buyer's agreement (in effect) one to pay the rate found reasonable by the Commission. Respondents' claim that the "reasonableness" standard applied by the Commission is too vague misconceives the common law test which requires only that there be some definite method for establishing a price where an express and specific price agreement is not contemplated. The courts have repeatedly upheld contracts providing for payment at whatever ceiling price is set from time to time by the Office of Price Administration or other government agency having authority over the price.<sup>5</sup>

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<sup>4</sup> We have shown in our main brief (at pp. 24-48) that the Gas Act does not require a precedent agreement on a rate or upon a rate procedure. The only requirement is that recognized in *Mobile*: — that the new rate filed under Section 4 (d) must not violate any existing contract price.

<sup>5</sup> See the cases cited in our main brief, p. 36, fn. 23; Brief for United Gas Pipe Line Co., No. 23, pp. 41-48; Brief for Texas Gas Transmission Corporation and Southern Natural Gas Company, No. 26, pp. 18-19. The cases cited also leave no doubt that an agreement to pay whatever price is filed, listed, or posted by the seller at the time of delivery is valid as a matter of general law.

Here, there is no uncertainty as to the price-setting mechanism. The Commission has authority to pass on the validity of the rate and hence there is no question that service-agreements referring to the rates allowed by the Commission are valid under general contract law.

3. Respondents also attempt to undercut our position (Govt. brief 39-44) that, under the tariff-and-service-agreement system of rate making prescribed by Order No. 144, the method of rate-making became by contractual agreement "as close to an *ex parte* method of rate-making as would be practicable in the natural gas industry, where some agreement on terms and duration is required to protect heavy investments by both buyer and seller" (Govt. Br. 16, 44). Respondents' attack is two pronged:—first, they argue that since the purpose of Order No. 144 was to achieve uniformity and simplicity in rate filings, not to affect substantive changes, Order No. 144 could not have intended to supersede the pre-existing system of individual bilateral agreements on rates (Resp. Br. 39-44); second, they urge that *ex parte* rates can exist only for prospective customers; once gas is sold to a buyer and he becomes an existing customer, the prices to him can no longer be *ex parte* (Resp. Br. 44-48).

(a). Respondents' first contention is based on a misunderstanding as to the operation of Order No. 144. That order permitted existing contracts, which typically contained escalation provisions, to remain in full force and effect as executed service-agreements until they expired or were superseded by service-agreements in the form contained in the company's

tariff (Section 154.85); accordingly, there was no impairment of existing contracts. However, when a gas company subsequently undertook to enter a new agreement with a customer (whether existing or prospective), or to change the terms of the old contract, the new agreement had to follow the form of service-agreement contained in the company's tariff (Section 154.85). As a result of these provisions, substantially all of the individually negotiated contracts have been superseded by uniform service-agreements which do not contain a fixed price (Govt. Br. 6, fn. 6). Since, as shown in our main brief (at pp. 73-75), escalation provisions could not be included in the service-agreements, the Commission—to meet objections to this prohibition—added the proviso to Section 154.38 (d) (3) of Order 144 which permitted the companies to reserve the right to propose changes in the existing rates. Substitution of the right to file rate changes, in the place of escalation clauses, minimized the impact of the order upon the gas companies and their purchasers, at the same time that it proscribed escalation clauses—as was necessary to achieve the sought-after simplicity and uniformity in rates.\* Thus, the provisions of United's service-agreements, as well as the requirements of the Commission's regulations, leave no doubt that the price portions of United's pre-existing contracts were replaced by the

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\* Respondents significantly omit all reference to escalation clauses in this portion of their argument. Apparently, they are willing to accept the benefits of their elimination under Order No. 144, but not the burdens of the countervailing right given to the gas companies in the proviso in Section 154.38 (d) (3).

uniform rate schedule on file with the Commission from time to time, and that the parties were no longer generally free to make individual bargains as to price.

(b). As to respondents' second contention, it should be noted at the outset that our position is not that the rates are in fact or in technical legal terms *ex parte*, but rather that they are as close to *ex parte* rates, pursuant to agreement, as is practicable in view of the heavy capital investment required of both the pipelines and their purchasers. See our main brief at pp. 39-44. Of course, we do not now contend that pipelines can impose *ex parte* rates on unwilling buyers; our sole position is that a pipeline and its buyers may agree in advance (as here) that changes in rates may be made by the seller pursuant to the mechanism of Section 4 of the Act. The *ex parte* system to which we refer is a consensually accepted *ex parte* system, not one imposed by the seller.

Moreover, respondents' claim that *ex parte* rates can exist only with respect to *prospective* customers is clearly in error. For example, under Section 7 (a) of the Act the Commission can order a gas company "to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, \* \* \*." Since all the Commission can do is to direct the gas company to supply the gas, and it cannot require it to execute a contract therefor, it is obvious that the resulting relationship between the parties is a true *ex parte*

situation and the gas company may file rate changes under Section 4 (d) without further assent of the purchaser. Another true *ex parte* situation may result when a service-agreement or fixed-price contract expires. In such a case, the gas company, although not required to renew the agreement, is nevertheless barred from terminating the sale unless authorized by the Commission under Section 7 (b) of the Act, which prohibits abandonment of "facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission \* \* \*." Since the service must thus be continued, the buyer can no longer have a contractual right to a certain rate and, like the Section 7 (a) purchaser, must pay for its gas in accordance with the rate schedules filed from time to time by the gas company. *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 236 F. 2d 289 (C. A. 3).'

' Respondents are also under another misapprehension as to the status of a filed "demand" *ex parte* rate. They state that (Resp. Br. 46) a "rate 'established' *ex parte* is in reality nothing more than a standing offer, in the nature of a price list, which can be withdrawn or changed at will prior to acceptance." Although a filed rate schedule is certainly a "standing offer" to sell at the stated rate, it cannot be withdrawn or modified by the seller without Commission authorization even prior to the execution of service-agreements embodying the rate. *Montakota Gas Co. v. Montana-Dakota Utilities Co.*, 5 F. P. C. 64, 72. A so-called "demand" schedule (*i. e.*, one that offers to sell at a given price) is subject to Section 4 (d)'s prohibitions against any "change" in a "rate" or "charge" filed pursuant to Section 4 (c), as well as to Section 5 (a) which provides that "Whenever the Commission \* \* \* shall find that any rate \* \* \* demanded, observed, charged, or collected by any natural-gas company \* \* \* is unjust,

Most significantly, Section 4 of the Act (as we have pointed out at pp. 47-49 of our main brief) does *not* state that the "schedules" filed under that section must consist of negotiated sales contracts. Section 4 (c), on the contrary, requires the filing of "rates" and "charges" governing any jurisdictional sales, "together with all contracts which in any manner affect or relate to such rates, charges \* \* \*." If there are rate contracts, Section 4 (c) requires that they be filed, but there is obviously no requirement that the "rate" or "charges" be embodied in fixed-price contracts, or that an agreement for changes by the seller is prohibited.\*

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unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge," etc. (emphasis added). Thus, the Act plainly provides that a filed schedule sets a *rate* in the jurisdictional sense—prior to, or in the absence of, an agreement between buyer and seller to transfer gas at that rate. This, of course, merely underlines the fact that the Act does not anticipate or require that all gas rates be based on private agreement, and certainly the Act does not require agreement on a specific fixed price.

\* Our analogy to the Interstate Commerce Act, which respondents condemn, was only for the purpose of showing that the Gas Act permitted *ex parte* rates as well as fixed-price or consensual rates. Our main brief specifically recognized (at pp. 45-46) that, as this Court ruled in *Mobile*, the Gas Act, unlike the Commerce Act, preserved private contracts and thus contemplated that rates under the Gas Act could be either contractual or *ex parte*. It disregards our actual contention to say that we are re-arguing *Mobile*.

## II

THE DECISION BELOW DOES NOT PROPERLY PRESERVE THE STABILITY OF SUPPLY ARRANGEMENTS WITH PROTECTION FOR ALL INTERESTS

As in the case of their attempt to show that the Court of Appeals properly applied *Mobile*, respondents' efforts to demonstrate that the decision below preserves the stability of supply arrangements (Resp. Br. 73-96) present a distorted picture of the true situation. Although they stress (Resp. Br. 14-15, 48) the distributors' need for a stable gas supply at reasonable rates to support their investment in distribution facilities, respondents at the same time minimize the need of the pipelines for adequate revenues in order to continue to provide the gas supply needed by the distributors to serve the constantly increasing demands of the ultimate consumers.\* As shown in our main brief (at pp. 85-100), the suspension and refund procedure provided in Section 4 (e), imperfect as it may be,<sup>10</sup> is

\* While it is true, as respondents urge, that the demand for gas has created the need for expansion of the gas industry, it does not at all follow that this demand alone was responsible for the industry's growth (Resp. Br. 76-77). Obviously, the industry would not have been able to undertake the expansion necessary to meet this demand if the investors who made the requisite capital available had not been assured of adequate returns on their investment.

<sup>10</sup> Respondents (Resp. Br. 93) make the wholly unrealistic suggestion that the pipelines have used the rate-filing procedures of Section 4 as an illegitimate device to obtain capital funds (subject to refund at 6% interest). Interest rates paid by pipelines on long-term capital loans during the past ten years (with rare exceptions) have varied from 3% to a maximum of 4½% per annum, depending on the money market and the particular company's financial condition. Obviously, no pipeline would deliberately incur a 6% repayment obligation when it can supply

the best device available for achieving the requisite accommodation of these mutually dependent interests. The solution proffered by respondents cannot attain that result.

1. To the extent that respondents do take cognizance of pipeline needs, they undertake to show that affirmation of the decision below will not throttle expansion nor impair pipeline financing, by citing various statistics for the interim period since the decision by the court below. Placed in proper perspective—particularly the fact that during this period the ruling below has not yet become final and is being challenged in this Court; and pending disposition by this Court the Commission has declined to follow and apply the Court of Appeals' decision in its administration of the Natural Gas Act—these statistics do not at all make out the case claimed by respondents. We take up their claims in order.

(a). The fact that the Commission has authorized additional pipeline expansion (Resp. Br. 78-79) does not necessarily mean that this expansion will in fact take place. The issuance of a certificate by the Commission merely authorizes construction and operation of the proposed new facilities. The companies to which the authorizations are issued have yet to go to the money markets for the funds needed, and, significantly, respondents refer to none of these com-

its capital needs at less than 5% interest. Moreover, the periodic capital requirements of most pipelines (ranging in the hundreds of millions of dollars) are so much greater than any amount they could possibly gain access to through rate filings that respondents' suggestion can be entirely discounted for this reason alone.

panies as having floated security issues during this period."

(b). Similarly, the Commission's statistics showing increases in pipeline net plant and income since July 1957 (Resp. Br. 80-81) do not support respondents' conclusion. The increase of net utility plant covers an entire year, including the substantial pre-*Memphis* period of late summer and fall 1957. These are among the seasons when a good part of actual construction work can be and is performed. It must also be remembered that the figures showing increased income over the previous years are based on actual rates in effect during this period, which include new rates filed without the purchasers' assent to the specific amount. These figures, therefore, do not reflect the substantial refunds which may have to be made in the event the decision below is affirmed. If such refunds are required, there will be a substantial drop in pipeline income as compared to prior years, even taking into account duplications and income tax savings.

(c). As to the five security issues which respondents claim have received favorable reception since the decision below (Resp. Br. 81-83), it is noteworthy that, in each instance, the prospectuses discussed at length the impact of the Court of Appeals' decision on the companies involved, and recognized its bearing upon investor acceptance of the issues. Moreover, the favorable reception received by these issues is clearly

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"The comment of the president of Tennessee Gas Transmission Company, quoted by respondents (Resp. Br. 79), is explicitly predicated on the assumption that "money is available at a fair rate and recognition of actual money costs by rate regulating agencies."

attributable to special factors in each case. Consolidated Natural Gas Company is engaged primarily in retail distribution,<sup>12</sup> and to that extent is not directly affected, in adverse fashion, by the ruling below. Columbia Gas System, as respondents have pointed out,<sup>13</sup> also has substantial retail distribution business. Tennessee Gas Transmission Company is highly diversified and has interests in life insurance, oil refining and production, petro-chemicals and rocket and missile fuels,<sup>14</sup> as well as gas transmission. Texas Eastern Transmission Company also has substantial interests in oil pipelines, and, further, since it buys some of its gas from other pipelines, it stands to receive a substantial refund in the event the decision below is affirmed.<sup>15</sup> And, in contrast to the relatively few security issues mentioned by respondents, there were over 35 securities issues floated by gas companies in 1957, in the aggregate amount of over 875 million dollars. See Moody's Public Utility Manual (1958), pp. a94-a96. Plainly, the favorable reception of the five issues cited by respondents does not accurately reflect the impact of the decision below upon the ability of pipelines generally to raise capital on favorable terms.

(d). The rate increase settlements referred to by respondents (Resp. Br. 83-84) fall far short of showing that rate increases can, as a general matter, be

<sup>12</sup> See Preliminary Prospectus dated July 18, 1958, at p. 13.

<sup>13</sup> See Respondents' Answer to Motion for Leave to File Briefs Amici Curiae in Support of Petitioners, at p. 2.

<sup>14</sup> See Prospectus dated February 4, 1958, at pp. 4-5.

<sup>15</sup> See Prospectus dated February 27, 1958, at p. 23.

obtained through negotiation by the pipelines with their customers. As of the date of the decision below, there were before the Commission rate increases filed by some 50 companies aggregating about \$217,000,000. Since the decision below, only five of these pipeline companies have been able to negotiate settlements, involving approximately \$37,000,000, leaving still before the Commission rate increases filed by 45 companies amounting to about \$180,000,000.

2. Respondents propose the anachronistic solution of a return to individually-negotiated agreements (Resp. Br. 84), and they stress the fact that negotiated agreements were the rule prior to the enactment of the Natural Gas Act in 1938. But these agreements, like those of the independent producers also referred to by respondents (Resp. Br. 85-86), were fully negotiated *before* any gas was sold or delivered to the prospective purchasers and contained provisions for appropriate escalations throughout the term of the contract. Thus, when the agreement was executed, the parties were on a parity as far as the bargaining position was concerned:—the prospective purchaser wanted to buy gas and the gas company had it to sell, and either party was free to terminate the negotiations if the proposed terms were not satisfactory to it. The pipeline's position *vis-à-vis* its customers today is entirely different, since by virtue of Order No. 144 its service-agreements may not contain pre-agreed escalation clauses; moreover, the pipeline, having once undertaken to serve a customer, is not free, without Commission authoriza-

tion under Section 7 (b) of the Act, to discontinue that service. Consequently, the customer is assured for the future of at least the same quantity of gas as it received in the past, and typically is under no pressure to agree to rate increases unless there is something, such as *additional* gas supplies, which it hopes to obtain in return for the higher rate. See our main brief at pp. 89-93.

Respondents also fail to explain away (Resp. Br. 85-86) the fact that the prime purpose of Order No. 144 was, as we have shown (Govt. Br. 86-87), to eliminate the widespread discrimination which had been a feature of many pipeline contract structures during the period of individually-negotiated prices. Although they urge (Resp. Br. 86) a return to individually negotiated agreements, respondents do not explain how the Commission will be able effectively to police these agreements in the absence of a uniform tariff-and-service-agreement structure.

Under the system in effect prior to Order No. 144, a pipeline was free to contract with its small buyers on terms, rates, and conditions of service which, as a result of the small buyer's weaker bargaining position, discriminated in favor of its larger buyers. Those contracts would then be filed with the Commission and would go into effect (as initial rates) and could not be reviewed by the Commission as to lawfulness under Section 4 (e). Since the buyer was in no position to attack its own contract, and the pipelines' contracts were usually non-uniform, making it difficult to detect

hidden discrimination, it was frequently not until years later that the discrimination inherent in the pipelines' rate structure would come to light, usually in a systemwide Section 5 (a) proceeding. The remedy provided by the Commission at that time could be prospective only. Thus, the old system virtually assured that discriminatory contracts would be outstanding for a substantial period of time with no retroactive relief possible.<sup>18</sup>

The present system, in contrast, provides much greater protection for the small buyer and ultimate consumer. First, most sales are made under uniform service-agreements eliminating any possibility of discrimination. Second, even if the pipeline should attempt to vary its agreement with a small buyer, it must first come before the Commission with a proposed form of service-agreement and satisfy the Com-

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<sup>18</sup> This condition was inherent in the system of individually negotiated contracts, and could not have been remedied by any policy or practice which might have been adopted by the Commission. The non-uniformity of the individual contracts (which frequently contained rate provisions based on external variables making face comparisons with other contract rates all but impossible), as well as the failure of the buyer or its customers to complain, made it impracticable for the Commission to institute individual Section 5 (a) proceedings to review each sale contract as it was filed. Hence, the existence of discriminatory provisions ordinarily would be discovered only after the extensive investigation made in a periodic systemwide Section 5 (a) proceeding, which brought forward for comparison and analysis all of the pipelines' sales contract. This problem was one of the most pressing that Order No. 144 was expressly designed to remedy.

mission that any departures from its standard form are reasonable and non-discriminatory. It cannot place in effect a non-standard service agreement with a small buyer until the agreement form has been adopted as a part of its tariff. (Order 144, Sections 154.21, 154.40, 154.85; our main brief, pp. 123, 125, 127-128). Since the pipeline will have at most two or three general service-agreement forms on file pertaining to a particular area (and its rates must be stated in a readily comparable form), it is a simple matter to detect and evaluate for possible discrimination any variations in the form of a new proposed agreement.

It follows that the Commission should not be forced to return to an outmoded and discarded system which it found, after much consideration, to be harmful to the consumer interest.

Respondents refer to the Commission's practice of allowing independent gas producers and electric companies to file individually negotiated contracts as rate schedules. However (as we point out, Govt. Br. 89, fn. 56), gas producer regulation is not now at a stage where it would be feasible to undertake the major effort required for conversion to a tariff system. Electric utility rates, on the other hand, are individually tailored to the needs of particular customers. The economics of the industry, including the local character of electric power generation, justify wide variations in the terms of service, and the use of short-term agreements and special arrangements. Hence, the rate structure of the electric industry is in no way comparable to that of the pipeline industry.

where many buyers may be dependent on a single pipeline, and where uniformity in rates and sales conditions is both feasible and highly desirable. For these reasons, the Commission has never considered it practicable or necessary to institute a tariff-and-service-agreement rate system for the electric utilities.

3. Apparently not convinced by their own arguments as to the efficacy of negotiations, respondents alternatively suggest (Resp. Br. 87-91) that the time now consumed in Section 5 (a) proceedings might be sufficiently curtailed to provide needed rate relief expeditiously. This suggestion is also predicated on the unwarranted assumption that all parties, including the purchasers, would cooperate to that end. While the pipelines could be expected to be fully cooperative, the purchasers' cooperation would, as in the case of negotiated agreements, be forthcoming only when, in *their own view*, they stand to receive a sufficiently attractive *quid pro quo*. See our main brief at pp. 93-99.<sup>17</sup>

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<sup>17</sup> Respondents refer (Resp. Br. 88-89), as they did in their brief in opposition to certiorari, to a speech made before the New York Society of Security Analysts on January 3, 1958, by the Chairman of the Commission. Aware that the decision below was having a serious adverse effect upon the pipeline industry and that it placed in jeopardy the plans of a number of pipelines to expand their service to the ultimate consumer, the Chairman's speech represented an effort to place the problems raised by the decision in perspective by emphasizing the inherent strength of the natural gas industry and its importance to the national economy. The Chairman expressed his view that the industry generally would not "necessarily" be bankrupted as a result of the decision, pointing to "hopes" that settlement of outstanding liabilities would be possible (if the de-

4. Respondents also place great emphasis on the fact that part of the gas supplied by United to Mississippi Valley is sold under nonsuspendible rates for industrial resale (Resp. Br. 22, 63-71, 91). They argue that the congressional exemption of such sales from the rate suspension provisions of Section 4 (e) of the Act is harmful to the consumer; that this exemption should lead to a restrictive interpretation of the service-agreements; and that the Commission has in some way "abdicated" its responsibility because of the exemption. The Commission readily agrees that its inability to suspend industrial resale rates is a weakness in the Act, although hardly the factor of major importance pictured by respondents. The simple fact is that very little gas is or has been sold

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cision below stood), and that the possible refund in some cases would be offset by duplicating refunds or tax adjustments. He also added that the Commission "may" be able to revise its procedures under Section 5 (a) to permit expedition of rate-increase proposals, a possibility specifically taken into account in our main brief (pp. 98-99), which would not necessarily redound to the consumers' benefit. The Commission has since formally stated its view of the importance of reversing the rule announced below, in *Matter of El Paso Natural Gas Company*, Opinion No. 308, Docket No. G-12948, issued January 24, 1958, 19 F. P. C: 154 (reprinted in the Appendix to the Reply Memorandum for the Federal Power Commission to the respondents' brief in opposition to the petition for certiorari in No. 25 (No. 694, Oct. Term 1957)).

Respondents also attempt to show inconsistency between the Commission's argument here and its position with regard to initial rates charged by independent producers. The soundness of the Commission's position on the latter matter is irrelevant here; it is raised in *Oklahoma Natural Gas Co. v. Federal Power Commission*, pending on petition for a writ of certiorari, No. 288, this Term, in which the Commission is not opposing the grant of certiorari.

under non-suspendible industrial resale schedules ("I" schedules). As a result of competitive factors (including the bargaining position of large industrial users), the vast majority of gas resold by distributors to industrial consumers is sold to the distributor under general or special service (i. e., non-industrial) rate schedules. Under the Commission's consistent interpretation, which has been generally accepted by the industry and has received judicial approval, rate changes in these schedules are suspendible, and the Commission as a matter of practice suspends all such rate increases (Govt. Br. 81-82). The amount of gas currently sold pursuant to non-suspendible industrial resale schedules is in fact less than two percent of the total jurisdictional sales of pipeline natural gas.

Respondents' brief is likely to give the wrong impression in this respect. They assert (Resp. Br. 67) that "Mississippi's sales for industrial use represent 64.9% of the total volume purchased by Mississippi from United for resale", but they fail to point out that much of Mississippi Valley's gas is purchased under United's Gas Rate Schedules DG-J and G-J, which are *suspendible* schedules, and that it purchases gas from four other pipelines for resale, industrial and otherwise,<sup>18</sup> and that *all* of the gas purchased from the other pipelines is under suspendible schedules. Additionally, although respondents recognize (Resp. Br. 67) that "It is the percentage relationships of a

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<sup>18</sup> Texas Gas Transmission Corporation; Southern Natural Gas Company; Olin Gas Transmission Company; and Texas Eastern Transmission Corporation. The purchases from Texas Eastern are minor, involving less than \$5,000.00 annually.

distribution company's industrial business to its total business that counts", they do not cite total purchase figures, which in fact throw a different light on their purchases under non-suspendible rates.

Thus, during the calendar year 1956 (the year of the *Mobile* decision), Mississippi Valley purchased \$8.33 million (dollar volume) of gas from its five suppliers of which only \$1.99 million or 23% were sold to it under non-suspendible schedules. In calendar year 1957, the last year for which figures are available, the dollar percentage of United's non-suspendible sales to Mississippi Valley dropped to 6% of this total (\$7.50 million total; \$.45 million non-suspendible, industrial).<sup>19</sup> Since none of Mississippi Valley's other suppliers sell to Mississippi Valley under non-suspendible rate schedules, it is clear that Mississippi Valley's industrial resale gas purchased under non-suspendible rates constitutes far less than half of its total gas purchases during the entire period here relevant. Moreover, as we have shown, Mississippi Valley's gas purchases from United are atypical since only a fraction of industrial gas today is sold under nonsuspendible rate schedules.<sup>20</sup>

<sup>19</sup> Nor, as Mississippi Valley implies, does it have to bear the burden of the non-suspendible increases. The schedules under which it resells the gas for local industrial (i. e., manufacturing) use have automatic escalation provisions permitting Mississippi Valley to pass on to these industrial customers increases in the cost of gas.

<sup>20</sup> We have pointed out (Govt. Br. 82) that the problem presented by the non-suspendibility of rates for industrial resale is well known to Congress which has repeatedly refused to enact a remedy. As early as May 1939, the Commission, in reporting to Congress on H. R. 5070 (a bill amending the Natural

## III

**UNITED'S SERVICE-AGREEMENTS AUTHORIZED IT TO CHANGE RATES UNDER SECTION 4 (d) OF THE NATURAL GAS ACT**

Recognizing that the court below did not pass upon the matter, respondents seek to support the judgment below on the alternative ground that the "any effective superseding rate schedule" language in the service-agreements did not authorize United to file new rate schedules under Section 4 (d) (Resp. Br. 48-72). Respondents concede that the language does not prohibit the filing of new rate schedules; they urge, rather, that it does not affirmatively authorize such a filing. But once it is recognized that the phrase contemplates flexible rates and embraces any rate which could legally be made effective under any appropriate provision of the Act, Section 4 (d) as well as Section 5 (a), it follows, as we have shown in our main brief (at pp. 100-115), that the phrase necessarily contemplated the filing of new rates by United under Sec-

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Gas Act), recommended deletion of the industrial resale exemption. Since that time, the Commission has repeatedly recommended legislation to remove the exemption (Govt. Br. 82), and numerous unsuccessful bills have been introduced to accomplish this. The evident failure of the municipalities, gas distributors, and industrial users vigorously to support the Commission's repeated recommendations, so as to ensure removal of the exemption, is an indication that it is not the major problem represented by respondents.

Since Congress has always refused to correct what both the Commission and respondents agree is a defect in Section 4 of the Act, the basic structure of Section 4 should not be distorted in order to eliminate even the possibility of non-suspendible industrial rate increases, where this will inevitably result (as we have shown, Govt. Br. 62-63) in nullification of the Commission's suspension and review powers over gas rates generally.

tion 4 (d). Inasmuch as the seller alone can file new rates under Section 4 (d) and thereby set in motion the procedure provided by that Section for rates to become effective, it is a contradiction in terms to urge, as respondents do (Resp. Br. 51), that, while the phrase embraces rates which are effective upon filing under Section 4 (d), it nevertheless does not contemplate that a seller may file the rate schedules necessary to achieve that end.

1. Apparently appreciating the inconsistency in its position, respondents claim that the only Section 4 (d) filings which are included within the phrase are those where the increased rate has been agreed to by the purchaser (Resp. Br. 51-52). This argument is circular, since it is predicated on respondents' contention that, only if the purchaser has agreed to the increase, can new rates be filed under Section 4 (d) and that *ex parte* rates to other than prospective customers are prohibited by the Act. Since we have shown (*supra*, pp. 2-22; our main brief, pp. 23-100) that this contention is based on a misreading of *Mobile*, respondents' contractual argument also falls.

Moreover, the "any effective superseding rate schedule" language would be superfluous and unnecessary, under respondents' present explanation of its scope. Assuming, as respondents urge, that it is designed to preclude a defense of illegality or impossibility in response to rate changes, it must also be remembered, as we pointed out in our main brief, that the phrase imposes an obligation not upon both the buyer and seller, as respondents cavalierly assume (Resp. Br. 52), but solely upon the buyer. If the parties must

agree in advance upon a specific new rate to be filed under Section 4 (d)—as respondents say—it is far more probable that, upon Commission review under Section 4 (e), the rates will be decreased rather than increased;<sup>21</sup> and since the decrease would benefit the buyer, the latter would not want to avoid the contract.<sup>22</sup> The *seller* in those circumstances might possibly seek to discontinue the sale, but, as shown in our main brief (at pp. 104–105), he is not free, even apart from the service-agreement, to do so without express Commission authorization. Hence, under respondents' interpretation, the critical phrase in the service-agreements could serve no purpose whatsoever.

2. Respondents also urge that, prior to *Mobile*, the Commission and the gas industry generally believed that the Act conferred upon the gas companies the right unilaterally to change rates, and consequently that the Commission's interpretation of the service-agreements is "an after-rationalization born of the *Mobile* decision and advanced to avoid it" (Resp. Br. 54). In so urging, respondents completely ignore the showing in our main brief (at pp. 73–76, 105–107, 129–132), that there was no such general understand-

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<sup>21</sup> In fact, respondents themselves assert that the purpose of Commission review under Section 4 (e) is to see whether the agreed-to rate should be *reduced* (Resp. Br. 52–53).

<sup>22</sup> Moreover, if the buyer must agree to the specific new rate before the mechanism of Section 4 can be invoked by the seller, it is difficult to see why the seller would desire, in advance, to preclude a defense by the buyer of illegality or impossibility through special language in the service-agreements; in the process of agreeing to the specific new rate, the buyer would, of course, also agree not to raise such a defense if the Commission confirmed the new rate (or reduced it).

ing in the industry; that a substantial segment of the industry disagreed with the Commission's reading of the Act; and that the proviso in Section 154.38 (d) (3) of Order No. 144 authorizing the gas companies to reserve in their service-agreements the right to file rate changes under Section 4 (d) was expressly designed to meet the pipelines' objection on this score. By exercising in their service-agreements this right, the pipelines were assured that, if the Commission's reading of the Act were incorrect (as some thought it to be and this Court held it to be in *Mobile*), they nevertheless had the right to file new rate schedules under their service-agreements.<sup>22</sup>

<sup>22</sup> Respondents incorrectly assert that the Commission's rejection of certain proposed service-agreements in *Houston Texas Gas and Oil Corp.*, 17 F. P. C. 303, 305 (affirmed, 251 F. 2d 643 (C. A. D. C.)), certiorari denied, 356 U. S. 959 (Resp. Br. 62) is inconsistent with its acceptance for filing of United's agreements, as well as hundreds of other such agreements containing the same or similar language. See, e. g., the service-agreements of El Paso Natural Gas Co. and of Northern Natural Gas Co. quoted by respondents (Resp. Br. fn. 31, pp. 55-56). In the *Houston Texas Gas* case, the pipeline sought to include in a service-agreement form a general statement "that Seller and Buyer or either of them may propose to the Federal Power Commission by filing under Sections 4, 5, 7 and the other Sections of the Natural Gas Act, as amended, for such changes, and only for such changes, in Seller's tariff, as Buyer and Seller have agreed upon and which are set forth hereinbelow:" without specifying in the form the changes which could be made. The Commission rejected the form (1) because it would have permitted the pipeline to enter into non-uniform and potentially discriminatory service-agreements with its various buyers, and (2) because non-uniform agreements are administratively unworkable in view of the tariff requirement for a single areawide rate. In other words, while *Houston Texas Gas* proposed to limit its right to file rate increases by agree-

3. Respondents argue (Resp. Br. 54), in addition, that Mississippi Valley's agreements were made prior to *Mobile* when it was under a misapprehension as to United's *statutory* rights to file revised rate schedules, and that it never intended to give United such a right *by contract*. Even if this were the case, Mississippi Valley nonetheless agreed in its service-agreements to pay whatever rate was on file with the Commission, and its mistake as to the law could not invalidate such an agreement. Equally important, United clearly never intended in its service-agreements to bind itself to charge a fixed price over a fixed term, as it had in its sales to *Mobile* for the Ideal Cement resale (Govt. Br. 25-26). It follows that, if the parties did not agree to sell and buy at United's rate on file from time to time, they made no binding agreement at all with respect to price. If that is the case, then United's sales to Mississippi Valley have been made on a true *ex parte* basis at all times since the service-agreements were entered into, and respondents certainly have no legal grounds for complaint.

4. In the course of arguing, from the correspondence between United and the Commission leading up to United's filings of its service agreement, that United did not intend by the phrase to reserve the right to file new rate schedules under Section 4 (d) (a matter fully discussed in our main brief at pp. 107-110), respondents claim that "unilateral rate proposals have been challenged by a larger number of direct customers than the Commission represents"

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ment to certain specified circumstances, the Commission required that it do so on a uniform basis, covering the same area and service.

(Resp. Br. 60, fn. 33). But respondents omit any mention of the time when this larger number were filed; in fact, all of them were filed *after* the decision below and hence clearly have no bearing on the parties' original interpretation of their service-agreements, particularly since the court below in directing the rejection of United's rate schedules assumed that the service-agreements gave United the right to file them. In contrast, although between the date of the *Mobile* decision and the decision below numerous rate increases were filed by pipelines servicing several hundreds of direct purchasers, only three, as stated in our main brief (at pp. 110-112), sought rejection of the filings on the ground that the customer had not agreed to the new rate. We repeat that this demonstrates that the overwhelming majority of the purchasers interpreted their service-agreements as giving their seller a right, unaffected by *Mobile*, to file rate changes without the further assent of the purchasers.

#### CONCLUSION

For these reasons, and those set forth in our main brief, it is submitted that the judgment below should be reversed, and the Commission's orders affirmed.

Respectfully submitted.

J. LEE RANKIN,  
*Solicitor General.*

WILLARD W. GATCHELL,  
*General Counsel,*

WILLIAM W. ROSS,  
*Attorney,*  
*Federal Power Commission.*

OCTOBER 1958.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1957

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Nos. 691, 694 AND 695

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UNITED GAS PIPE LINE COMPANY, ET AL., *Petitioners*

V.

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.

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On Petitions for Writs of Certiorari to the United States Court  
of Appeals for the District of Columbia Circuit

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**BRIEF OF MEMPHIS LIGHT, GAS AND WATER  
DIVISION, THE CITY OF MEMPHIS, TENNES-  
SEE, AND MISSISSIPPI VALLEY GAS COM-  
PANY IN OPPOSITION**

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**OPINIONS BELOW**

The opinion of the Court of Appeals for the District of Columbia Circuit (F.P.C. Pet. App. A, pp. 31-42) is not yet reported. The opinion of the Federal Power Commission (R., pp. 224-237; App., pp. 13a-26a<sup>1</sup>) is reported at 16 F.P.C. 19 and at 15 P.U.R. 3d 279.

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<sup>1</sup> The reference is to the "Appendix to Petition for Writ of Certiorari" in No. 691.

## JURISDICTION

The judgment of the Court of Appeals was entered November 21, 1957 (F.P.C. Pet. App. A, p. 42; App. p. 12a). The petitions for writs of certiorari in Nos. 691, 694 and 695 were filed on December 27, 29 and 31, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

## QUESTION PRESENTED

Gas purchase contracts provided for the payment of a price referred to in a specified rate schedule "or any effective superseding rate schedules, on file with the Federal Power Commission". The seller purported to file an increase in the contract rate without agreement of the contract customers on the rate proposed by the seller. The question presented is:

Whether under the rule of the *Mobile* case (*United Gas Pipe Line Company v. Mobile Gas Service Corporation*, 350 U.S. 332) such a unilateral proposal is eligible for filing under Section 4(d) of the Natural Gas Act.

## STATEMENT

Respondent Memphis Light, Gas and Water Division is the gas distribution agency of Respondent City of Memphis, Tennessee (hereinafter jointly referred to as "Memphis"). Memphis purchases all of its gas supply from Petitioner Texas Gas Transmission Corporation (hereinafter "Texas Gas"). The latter, a natural gas pipeline company, in turn, purchases a substantial part of its gas supply from Petitioner United Gas Pipe Line Company (hereinafter "United").

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Respondent Mississippi Valley Gas Company (hereinafter "Mississippi") is a natural gas distribution company selling natural gas locally for domestic, commercial and industrial purposes in the City of Jackson and other areas in Hinds County, Mississippi. Mississippi purchases a substantial part of its gas supply directly from United. It also purchases a portion of its gas supply from Texas Gas and Southern Natural Gas Company (hereinafter "Southern"), which purchases a substantial part of its gas supply from United.

At the times pertinent to the disposition of the issues herein, Texas Gas, Mississippi and Southern purchased natural gas from United under long-term contracts, called "service agreements", under the Regulations of Petitioner Federal Power Commission (18 C.F.R. 154.12, 154.85). All of the contracts were on file with the Commission, and each contract specified rates agreed to by the parties to the contracts and approved by the Commission.<sup>2</sup>

On September 30, 1955, United, purporting to act under the authority of Section 4(d) of the Natural Gas Act (15 U.S.C. § 717c(d)<sup>3</sup>), filed proposals to increase by approximately \$9,978,000 annually its contract rates for sales of natural gas for resale for domestic, commercial and industrial purposes (R., pp.

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<sup>2</sup> The pertinent agreements with Mississippi are three in number dated March 25, 1955 (R., pp. 61-74j), with Southern are dated May 7, 1951 and September 30, 1952 (R., pp. 84-88, 92-99), and with Texas Gas are dated April 16, 1945 and August 11, 1952 (R., pp. 101-108, 108-115).

<sup>3</sup> The section is set forth in Appendix B to the petition for certiorari filed by the Solicitor General (p. 44).

115-116). No customer of United had agreed to the proposed increase in rates (F.P.C. Pet., App. A., p. 37).

On October 26, 1955 the Commission ordered a hearing to inquire into the reasonableness of the proposed rate increases filed by United. By "Order Suspending Proposed Increases in Rates" the Commission suspended the "proposed rate increase" as to domestic and commercial rates for the statutory five-month period on the ground that "the increased rates and charges proposed" had not been justified and might be unlawful (R., pp. 115, 116). The proposed industrial rate increases to Mississippi were not suspended since Section 4(e) (pursuant to which the Commission was purportedly acting) does not permit suspension of industrial rates, and the higher rates have been paid by Mississippi since November, 1955.

Memphis, Mississippi and a number of others, including petitioners Texas Gas and Southern, intervened in the proceedings before the Commission to contest the new rates sought by United (R., p. 141). In February, 1956, during the pendency of the hearing before the Commission, this Court issued its decision in *United Gas Pipe Line Company v. Mobile Gas Service Corporation*, 350 U.S. 332, holding that a gas seller could not unilaterally increase its contract rates for gas, and that the Commission is without jurisdiction to accept a filing under Section 4(d) purporting to effect such a unilateral change. Memphis and Mississippi thereupon moved for rejection of United's filing, and for a refund of the increases in industrial rates (which had not been suspended)

on the ground that United's filing of new rates which had not been agreed upon by its contract customers was illegal under Section 4(d) as construed in the *Mobile* decision.

The pipeline company petitioners resisted these motions on the theory that United's filing was authorized under the following provision of the rate contracts involved:<sup>4</sup>

**"PRICE**

"All gas delivered hereunder shall be paid for by Buyer under Seller's rate schedules [appropriate rate schedule designation], or any effective superseding rate schedules, on file with the Federal Power Commission."

United asserted (R., pp. 157, 186), with the full agreement of Texas Gas and Southern (R. pp. 168, 169, 171, 173), that prior to the *Mobile* case and at the time its contracts were made it "was generally considered and accepted, United included, that rates provided in a contract were subject to change by a filing under Section 4(d)"; that the provision quoted above "was offered and understood in the gloss of United's contentions and understanding in the

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<sup>4</sup>This provision appears in each contract except the contracts dated April 16, 1945 with Texas Gas and May 7, 1951 with Southern. The Commission contends, however, that the provision became a part of these contracts because of certain provisions of the "General Terms and Conditions" of the Tariff (FPC Pet., p. 8, note 8). For purposes of its decision the court below assumed, without deciding, that all seven contracts contained the same provisions (FPC Pet. App. A, p. 36, note 2). If certiorari were to be granted, we would reserve the right to raise the question whether the reference to "effective superseding rate schedules" may be imported into the two contracts.

*Mobile and Tyler cases*" (R., pp. 160, 188-189).<sup>5</sup> and that consequently the quoted provision constituted agreement on a procedure for changing contract rates whereby the seller could propose an increase in rates, the purchaser could oppose, and the Commission acting as arbitrator would dispose.<sup>6</sup>

The Commission upheld the contentions of the gas company petitioners and denied the motions of respondents to reject the rates (R., p. 237). The Commission ruled (R., pp. 236-237) that "United's *proposal* for increased rates in this proceeding does not constitute a prohibited unilateral change of a contract, for the contract language supplies the purchaser's assent to United's *filing* of a change in rates."<sup>7</sup>

The Court of Appeals for the District of Columbia Circuit unanimously reversed the Commission's order denying respondents' motions to reject the new rate schedules (F.P.C. Pet., App. A, pp. 31-42). The Court (per Judge Washington) noted the close simi-

<sup>5</sup> See the statement in the *Mobile* decision describing United's understanding of Section 4 of the Act as establishing a "rate-changing 'procedure'—a 'proceeding' before the Commission 'initiated' by a natural gas company filing a 'proposed' change". 350 U.S. at 342.

<sup>6</sup> Southern stated (R., p. 4):

" \* \* \* United's service agreements \* \* \* clearly contemplate that the Seller may submit to the Commission under Section 4(d) changes in rates with *the Commission acting as the arbitrator* between the parties under its powers granted by Sections 4(d) and (e), and in accordance with the standards established by Sections 4(a) and 4(b) of the Act. \* \* \*"  
(Italics supplied)

<sup>7</sup> Unless otherwise stated italics and parentheses appearing in quotations are supplied.

larity of the case to *Mobile*, in that each case involved an attempt by a pipeline company to increase contract rates for gas without obtaining the consent of the contract customers to the proposed increases (F.P.C. Pet., App. A, p. 36). The Court pointed out that the sole distinction between the cases is that the contracts in the case at bar contain language construed by the Commission as contractual assent to the act of filing the proposed rates under Section 4(d) of the Act (F.P.C. Pet., App. A, pp. 36-37). The Court assumed without deciding that the Commission may have correctly inferred consent of the contract purchasers to the filing of the proposed increases,<sup>8</sup> but the Court concluded that such consent could not in any event be equated to consent to the new rates. And Section 4(d) permits the filing only of agreed changes in contract rates. The parties could not, by consent to a filing not authorized by the statute, confer jurisdiction on the Commission which this Court had held in the *Mobile* case the Commission did not possess (F.P.C. Pet., App. A, pp. 37-42).

The court said (F.P.C. Pet., App. A, p. 39):

“\* \* \* we hold that since United had not obtained the consent of its contract customers to the rate itself—albeit some of those customers may have consented to the act of filing—the Federal Power Commission had no power to file the new rate schedules under Section 4(d) and therefore could not review the new rate pursuant to Section 4(e).”

The court observed that a mere consent to the filing of disputed rate increases could at most be inter-

<sup>8</sup> A holding challenged by respondents (*infra*, pp. 12-18).

preted as an agreement among the parties to have the Commission arbitrate disputes among contracting parties, a function not conferred upon the Commission by the enabling statute. The court quoted and relied upon this Court's delineation of the statutory scheme in *Mobile*, making clear that the Commission had power under Section 4(d) *only to review* changes in contract rates *not to make* changes which the contracting parties were disputing. A rate change opposed by the contract purchaser may be achieved only by Commission order, after an appropriate proceeding pursuant to Section 5(a) of the Act, in which it is affirmatively found that the existing rates are unreasonable, discriminatory or otherwise unlawful (F.P.C. Pet., App. A, pp. 38-41).

The judgment of the Court of Appeals requires the Commission to reject the schedules filed by United and to initiate appropriate proceedings to secure refunds of the increased rates paid to United during the period since the schedules were erroneously allowed to become effective (F.P.C. Pet., App. A, p. 42).

## ARGUMENT

### I.

The decision below is clearly correct and represents a proper application of the unanimous decision of this Court in *United Gas Pipe Line Company v. Mobile Gas Service Corporation*, 350 U.S. 332, to a factual situation basically similar to that presented in the *Mobile* case. It is apparent that the Solicitor General, the pipeline company petitioners, and the other pipeline companies which have sought leave to file briefs *amici curiae* are seeking merely to secure

a belated rehearing of the *Mobile* decision or to restrict it unduly to its precise facts.<sup>9</sup>

<sup>9</sup>It is ironic that petitioner United urged in its petition for certiorari in the *Mobile* case (Pet., p. 8) that "The decision below squarely presents broad and highly important questions of interpretation of the principal affirmative provisions of Section 4 of the Act in such way, Petitioner submits, as to nullify the provisions of Section 4" since, United asserted, all rates between natural gas companies and their purchasers under the Natural Gas Act "depend on contract whether 'common law,' by virtue of a *signed service agreement*, mere service acceptance or otherwise \* \* \*" (Pet., p. 11; italics supplied). Having lost *Mobile*, United now argues (United Pet., p. 11) that "The *Mobile* case dealt only with, and its rationale is limited to, a specific contract conditioned for a term and at a price upon a known resale arrangement".

And the Solicitor General's petition in *Mobile* (Pet., p. 23) urged that the "issue decided by the court below is one of importance in the administration of the Natural Gas Act and, in addition, of the Federal Power Act". "The regulation in the public interest of rates for natural gas and electricity", the Solicitor General stated (Ibid.), "would be retarded for the court below would require that all rate increase proposals which involve existing contracts would be subservient to the actions of the parties to the contract." Now, however, the Solicitor General asserts (FPC Pet., pp. 15, 16) that "*Mobile* was based not upon the broad ground that sales were being made pursuant to a general agreement \* \* \* but rather upon the specific circumstance that the particular contract prescribed a specific rate and contained no contractual mechanism for effectuating rate changes".

The Solicitor General refers to the case below as upsetting the Commission's and natural gas industry's "long-standing construction of Section 4 of the Natural Gas Act" (FPC Pet., pp. 12-13) although that asserted construction was upset by the *Mobile* decision two years ago, and the case at bar is the first litigated case in which the Commission and the industry have sought to restrict the scope of the *Mobile* rule. The unrestrained character of the Solicitor General's predictions of calamity if the decision below stands (FPC Pet., p. 13) suggests that the Commission simply has not accepted the interpretation of Section 4 definitively established in *Mobile*.

The facts of the present case bring it squarely within the *Mobile* rule. Contract rates were fixed by reference to existing rate schedules on file with the Commission, and the contract customers of United (like the contract customer of United in the *Mobile* case) have not consented to the change in the contract rates proposed by United. Thus in each case the pipeline company has sought unilaterally to impose rate increases on its contract customers through the device of a Section 4(d) filing.

In *Mobile*, United attempted to use the rate-changing procedures (whereby the seller could file a proposal to change contract rates which the purchaser could oppose and which the Commission would then arbitrate) on the ground that Section 4(d) authorized it to invoke them. This Court held that it could not, because Section 4(d) did not provide rate-changing procedures, but only procedures for the review of already established rates—and where contracts were involved, this meant rates agreed upon by the contracting parties. In this case United is attempting to use the identical rate-changing procedures, but this time on a different ground, viz.: that its rate contracts authorize it to invoke them. The answer remains, however: Section 4(d) does not provide rate-changing procedures, and the parties cannot create such statutory procedures or empower the Federal Power Commission to exercise a rate-changing function which Congress has not granted it.

The “effective superseding rate schedules” provision of the contracts relied upon by the petitioners, in no way distinguishes this case from the situation which this Court ruled upon in *Mobile*. Assuming

that the provision to pay for gas in accordance with "effective superseding rate schedules, on file with the Federal Power Commission" constitutes an agreement to a "contractual mechanism for effectuating rate changes," as the Commission now calls it (F.P.C. Pet., p. 16), or to a "deliberately conceived mechanism of adjustment," as United now calls it (United Pet., p. 11), the fact remains that the "mechanism" to which the petitioners refer is an administrative procedure which has no existence in law.<sup>10</sup> It did not exist in *Mobile*, because the statute did not provide an administrative rate-changing procedure; it does not exist here because no agreement of the parties can create such a rate-changing procedure.

The Court of Appeals assumed, without deciding, that the "effective superseding rate schedules" provision may be interpreted as indicating implied consent to the *filing* of new proposed rates, although not consent to the new rates themselves. Even on this assumption the Court correctly held, however, that the parties could not by consent to filing confer jurisdiction upon the Commission to arbitrate rate controversies between the parties. Only bona fide,

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<sup>10</sup> Although the Commission in its opinion repeatedly referred to and recognized United's filing as constituting only a "proposal" for an increase in rates (R., pp. 225, 231, 236, 237), the Solicitor General would now gloss over the fact that the only agreement that can be claimed is agreement upon the method or procedure for changing rates that United and the Commission, prior to *Mobile*, thought was conferred by Section 4(d) of the Act. This effort is made in the face of the conceded facts (e.g., United Pet., pp. 3, 16-17; Texas Gas Pet., p. 2) that the contract customers of United: (1) have not agreed in advance to any specific rate change, (2) have not eschewed their right to resist the proposed rate change before the Commission and in the courts, and (3) are actively resisting the proposed rate change.

*agreed* changes in contracts may be filed with the Commission pursuant to Section 4(d). An agreement that the pipeline company may file a non-agreed rate change is simply an agreement that the pipeline company may do that which this Court has held that it may not lawfully do. And with respect to the Commission, it is an agreement that the agency may accept for filing proposed rates which this Court has held to be ineligible for filing.

In so holding, the court of appeals in no way extended the holding of the *Mobile* decision. The basis of decision in both cases was identically the same: the non-existence of the administrative procedures relied upon by United for effectuating its rate increases, and relied upon by the Commission as authorization to grant such increases.

## II.

The decision of the court below is also correct for another reason. The assumed difference between the contracts at bar and the contract in the *Mobile* case—consent to the act of filing—does not find support in a proper interpretation of the contract language here involved. It is clear that the “effective superseding rate schedules” provision may not be construed as agreement by the contracting parties on a procedure for obtaining rate increases, or, as the court of appeals put it, “consent to the act of filing” (F.P.C. Pet., App. A, p. 37). The contracts in this case are, therefore, indistinguishable from the contract in the *Mobile* case.

The provision itself connotes no such meaning. To find in the provision an agreement on a rate-change

procedure with respect to Section 4(d) of the Act requires reading into it what is neither there nor reasonably to be implied. No evidence, contemporaneous or otherwise, supports the interpretation urged by the pipeline companies which the Commission adopted.<sup>11</sup>

Contrary to the Solicitor General's unsupported assertion (F.P.C. Pet., p. 16), there was no general industry understanding with regard to the effect of the provision, which corresponded with petitioners' interpretation of the provision.<sup>12</sup> Any general industry understanding that may have existed involved the meaning of the Act and was the understanding urged

<sup>11</sup> Texas Gas and Southern candidly reveal (Texas Gas Pet., p. 4) their subjective and special interest in sustaining this interpretation of the provision. They "have many long-term service agreements" with their customers "containing price clauses similar to those in United's service agreements" (Ibid.).

<sup>12</sup> Willmut Gas and Oil Company, a purchaser of natural gas from United under the same type of contract, in a separate petition for review from the Commission's Opinion No. 295, filed with the court below in No. 13,683, asserted that it intended no such agreement. On December 26, 1957, the court below in a *per curiam* opinion reaffirmed in that case its holding in the *Memphis* case without reaching the question of contract interpretation. *Willmut Oil and Gas Co. v. United Gas Pipe Line Company*, F. 2d . .

Additionally, numerous motions are on file with the Commission in which purchasers of natural gas under contracts containing similar "effective superseding" provisions have taken exception to the interpretation urged by petitioners. The most recent motions were filed January 16, 1958, in *Colorado Interstate Gas Company*, Docket No. G-13541, by Public Service Company of Colorado, The Pueblo Gas and Fuel Company, Kansas-Colorado Utilities, Inc. and Plateau Natural Gas Company, who assert (p. 2 of their motion) that "in neither of said contracts or service agreements have (they) consented or agreed that Colorado Interstate Gas Company could unilaterally increase or in any way modify the schedule of rates and tariffs therein contained".

by United and the Commission in *Mobile* and rejected by this Court, namely, that the Act established rate-change procedures which conferred upon the seller the power to file rate increase proposals under Section 4(d) of the Act. Indeed, the interpretation now contended for by petitioners is not one which was contemporaneous with the execution of the contracts. It is an after-rationalization born of the *Mobile* decision and advanced to avoid it.

The only contemporaneous evidence of record as to the meaning of the provision repudiates the petitioners' interpretation. Section 154.38(d)(3) of the Commission's Regulations (App., p. 45a) expressly provides that a seller "may state in the service agreement \* \* \* that it is or will be its privileges under *certain specified conditions*, to propose to the Commission a modification, change or substitution of the then effective rate or charge."<sup>13</sup> United first tendered to the Commission for approval a form of service agreement which contained the "effective superseding rate schedules" provision and additionally provided that. (R., p. 194):

"The rates established by Seller are designed to reflect Seller's cost of rendering service to provide a fair rate of return to Seller. In the event of an increase in Seller's cost, or of any change which would result in the rate of the Seller providing less than a fair rate of return, *Seller shall have the right to revise its rates to reflect such change*. Such revised rates shall be charged only

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<sup>13</sup> This regulation ante-dated the *Mobile* decision and was drafted and adopted under the misconception then prevailing that Section 4(d) of the Act provided a rate-changing procedure that contemplated the filing of unilateral rate proposals by the seller.

after they have been filed with the Federal Power Commission and become effective in accordance with its rules and regulations."

The quoted provision never became effective and was removed by United from the form of service agreement finally adopted by United and approved by the Commission when the Commission objected to the quoted provision as an attempt by United to reserve the right to change rates automatically, contrary to the Commission's regulations. Whatever may be said of the Commission's construction of the quoted provision, the fact is that United's original attempt to include the quoted provision in addition to the "effective superseding rate schedules" provision shows clearly that United did not deem the latter provision to give it contractual license to file rate change proposals and considered the rejected provision necessary for this purpose.

Plainly, the "effective superseding rate schedules" provision of the contracts is agreement only that the contracts are subject to the paramount power of the Commission to modify them in the public interest. This construction does not read the words out of the contracts. The language makes certain that the purchaser must continue to buy from United the quantities provided for in the contract for the entire term, even if the Commission exercises its regulatory power to increase the rate thereunder. It precludes the defense of illegality or impossibility based upon the Commission's action; in effect, it makes Commission action a part of the contract. It precludes a contract customer from contending that an increase validly ordered by the Commission entitles the customer to

cease purchasing thereunder and to obtain its gas supplies elsewhere.

Mississippi has always viewed the language as agreement to pay new rates, if, as and when they became legally effective pursuant to valid exercise of the Commission's regulatory powers, whatever they might be. Mississippi had no intention to give effectiveness to rates which in the absence of its consent could not be effective. Mississippi emphatically denies that it has ever voluntarily intended to give advance, *carte blanche*, agreement to any rate increase which United may at any time desire to make. Mississippi buys substantial volumes of gas from United for resale for industrial use. As to these purchases, the suspension and refund provisions of Section 4(d) do not apply.<sup>14</sup>

If the rate for such service is effective by the mere act of filing, then during the entire pendency of the rate proceedings, which may last two years or more, United would pocket *irrevocably* the increased rates which it has chosen to impose. Moreover, when the final order of the Commission reduced the rate for industrial gas—prospectively only—United could raise them again by simply filing new increases. At

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<sup>14</sup> See Commission order issued December 7, 1953 in *Matter of Mobile Gas Service Corp.*, Docket No. G-2227, where the Commission stated (Appendix to the Petition of United in the *Mobile* case, pp. 18-23):

“But, clearly, the power to require refunds under Section 4(e) of the Act applies only to rates which are subject to suspension and which have been suspended. An interpretation permitting refunds of that part of the sales for resale for industrial use only found not to be justified would nullify the proviso against suspension of these rates, obviously a course of action which the Commission cannot take.”

the present time United has three consecutive rate increase proceedings pending in the Commission<sup>15</sup> and since November, 1955 Mississippi has been forced to pay increased rates for industrial use gas, without recourse, during the pendency of the rate proceedings.

The Commission has represented to this Court that if unilateral rate increases were permitted to be filed under Sections 4(d) and 4(e) "both pipeline and consumer interests are fully protected" (F.P.C. Pet., p. 29). The facts are to the contrary. In the first place, as to industrial rates, the review procedure under Section 4(e), being prospective in effect only, is essentially useless since as fast as the Commission outlaws unjust increases the pipeline companies may file new ones and *collect the increased rates which will never be refunded*. In the second place, as the Commission admits, the Commission is not required to institute review proceedings under Section 4(e), and the right of intervention in such proceedings as are held is not absolute (F.P.C. Pet., pp. 19-22). Finally, as the majority judges of the court below pointed out in a footnote (F.P.C. Pet., App. A, p. 41), in a Section 4(e) proceeding the pipeline company is not required to establish that the old, agreed-upon rate is unreasonable or otherwise unlawful.

It is inconceivable, therefore, that Mississippi, or any other distribution customer, would voluntarily enter upon a contract with United which would deliberately make effective any rates for industrial gas service which United chose to charge. It is true that heretofore Mississippi has been forced to exist under conditions where United has filed increases in its

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<sup>15</sup> Dockets Nos. G-9547, G-10592 and G-12801.

rates in whatever amounts and at whatever times United chose, and where United could retain its non-suspendible increases no matter how excessive they were eventually found to be, but Mississippi emphatically denies that it has placed itself in that position by any voluntary agreement (Tr. 19). The situation was solely the result of the Commission's interpretation that Section 4 is a rate-changing procedure which is vitalized merely by unilateral rate filings of natural gas companies.

Therefore, respondents submit that the "effective superseding rate schedules" provision was not intended to lend effectiveness to rate filings which would otherwise be of no effect. No customer would voluntarily give such unlimited power to its supplier.

### III.

In an effort to secure review of the decision below, petitioners and the amici curiae, without documentation or substantiation, make sweeping allegations respecting the effect of the decision below predicting destruction of the regulatory scheme (United Pet., pp. 11, 12, 16; Texas Gas Pet., pp. 4-5, 6), administrative burdens (F.P.C. Pet., p. 13; Texas Gas Pet., pp. 7-8), financial disaster, economic chaos, confusion and futility, and impracticable rate procedures (F.P.C. Pet., pp. 29-30; United Pet., pp. 10, 11; Texas Gas Pet., pp. 6-7, 8, 9; Ohio Fuel Amici Br., pp. 7, 8-9, 10).<sup>16</sup> In marked contrast to these allega-

<sup>16</sup> The same claims were made in the *Mobile* case, first as reasons for granting the writ and thereafter as grounds for reversal of the lower court. In its petition and brief in *Mobile*, United urged (Pet., pp. 8, 9, 10; Main Brief, pp. 15, 47) that the decision of the court below was "sweeping", "disrupting" and "destructive" of

tions are the statements of Chairman Kuykendall of the Federal Power Commission in an address delivered in New York on January 3, 1958, to the New York Society of Security Analysts:

"\* \* \* I do not believe that this industry necessarily must become bankrupt if this decision stands.

The demand for natural gas is as great now as it was before the *Memphis* decision. There is still a market and a seemingly insatiable demand for the product. Unlike an old overcoat or automobile, old gas supplies previously used, cannot be made to serve longer. Where there is a demand and a supply, sales and purchases will

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the regulatory scheme, imposed "intolerable", "overwhelming" and "impossible" burdens on the Commission, and "produces utter chaos and confusion in its (the Act's) administration". The Commission, for its part, in its petition in *Mobile* alleged that "regulation in the public interest of rates for natural gas and electricity would be retarded" (p. 23); that the decision would "increase the administrative load of the already overburdened Commission"; and would "result in even more delay in Commission action on rate increases needed by gas companies to offset constantly rising costs" (p. 24).

The hue and cry raised by petitioners and amici curiae in this case are also reminiscent of the dire, but never realized, predictions that were loosed upon the air by pipeline companies, producers and the Commission following the decisions of the D. C. Circuit in the *Phillips* case (*State of Wisconsin v. Phillips Petroleum Co.*, 205 F. 2d 706, affirmed *sub nom. Phillips Petroleum Co. v. State of Wisconsin*, 347 U.S. 672) subjecting producers' interstate rates and sales of natural gas to Commission jurisdiction, and in the *Panhandle* case (*City of Detroit v. Federal Power Commission*, 230 F. 2d 810, *certiorari* denied, 352 U.S. 829) rejecting field price as a basis for rate-making.

Such claims, in any event, are irrelevant to a decision of the issues. *Saturn Oil and Gas Co., Inc. v. Federal Power Commission* (C.A. 10, Nov. 20, 1957), F. 2d ; *Mississippi River Fuel Corp. v. Federal Power Commission* (C.A. 3), 202 F. 2d 899, cert. dismissed, 345 U.S. 988; *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.* (1933), 289 U.S. 266.

be made. Thus the essential ingredients for a healthy industry remain."<sup>17</sup>

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"\* \* \* I will repeat that I find it difficult to believe that the *Memphis* decision will ultimately cause the bankruptcy of an important part of the natural gas pipeline industry, and thereby prevent the public from getting the natural gas service it needs and deserves."

Equally striking is the contrast between the representations made to this Court in the briefs of petitioners and amici curiae and the statements made by Transcontinental Gas Pipe Line Corporation, one of the amici curiae and one of the Nation's largest pipeline companies, in a letter to its stockholders dated December 27, 1957, with reference to the decision below:

"The Court's decision makes more difficult the problem of obtaining a rate increase but does not mean that Transcontinental is entirely without recourse as and when increased rates are necessary to maintain a reasonable rate of return. By agreement with our customers, the Company can file for such increased rates. In the absence of such agreement the Federal Power Commission can investigate our rate requirements and at the conclusion of such investigation permit us to file such higher rates as are found necessary. Other possibilities are being explored, and we feel confident a satisfactory solution will be worked out."

<sup>17</sup> In the face of the demand for greater supplies of natural gas Texas Gas and Southern are clearly wrong when they assert (Pet., p. 6) that the seller "is without any negotiating position" if it must negotiate with its customers for higher rates.

So, too, Texas Gas' protest that it is "impracticable" (Texas Gas Pet., pp. 6-7) for pipeline companies to negotiate with their customers for needed rate increases is contradicted by the fact that Texas Gas, since the *Memphis* decision and in accordance therewith, concluded negotiation of agreements for increased rates with all but one of its customers—64 in number, including Memphis and Mississippi Valley—and on December 20, 1957 filed them with the Federal Power Commission under Section 4(d) of the Act. *F.P.C. Press Release No. 9617*, January 7, 1958; *Wall Street Journal*, January 9, 1958.<sup>18</sup> Furthermore, time and again in the past pipeline companies have negotiated and agreed on new rates as a basis for settling rate proceedings with their customers with Commission approval. E.g., *United Gas Pipe Line Company*, Opinion No. 277, 13 F.P.C. — (November 2, 1954); *Texas Gas Transmission Corporation*, Docket No. G-2017, 14 F.P.C. —; *Northern Natural Gas Company*, Docket No. G-2505, 16 F.P.C. 803.<sup>19</sup> Negotiations looking to settlement of pending rate cases, in lieu of trial thereof, involve, of course, precisely the same process that would be involved in negotiating new rates prior to filing.

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<sup>18</sup> The Commission approved the new, agreed-upon rates on January 17, 1958. *F.P.C. Press Release No. 9643*, January 20, 1958. Consequently, Texas Gas has secured new rates by negotiation in substantially less time than the Commission has taken by hearings under Section 4.

<sup>19</sup> Colorado Interstate Gas Company, one of the amici curiae, has just advised the Commission that it is undertaking negotiations with its customers to agree on new rates in settlement of all of its pending rate cases. *FPC Press Release No. 9625*, dated January 14, 1958.

Moreover, individually negotiated agreements were the rule up to 1938, prior to regulation. Individually negotiated agreements, over 27,000 in number, are on file with the Commission as rate contracts between producers of natural gas and their customers, since the Commission has not required the adoption of a standard form of agreement for producers. *F.P.C. Press Release No. 9622*, dated January 9, 1958. Also, individually negotiated agreements are the rule between interstate electric utilities and their customers under the Federal Power Act, where the Commission has not required the adoption of a standard form of contract.

The argument is made (F.P.C. Pet., pp. 13, 28-30; Texas Gas Pet., pp. 7-8) that a Section 5(a) proceeding is an unsatisfactory rate relief procedure in periods of rising costs because the new rates are effective only prospectively and after investigation and hearing. Again compare Chairman Kuykendall's statement in his speech to the New York Security Analysts:

"\* \* \* I suspect that we may find a rate case under section 5 can be processed in much shorter time than was ever thought possible. We know that in such a case, the pipeline company would supply all the data that our staff would request, as soon as it possibly could. When the customer companies realize that additional supplies of needed gas cannot be forthcoming until the pipeline company is first granted reasonable rates, it would seem that they would likewise cooperate to bring the case to a speedy conclusion."

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The fact is that in at least ten states and Hawaii<sup>20</sup> rate increases may be made effective only prospectively, and after investigation and hearing. This has been the situation for many years, and financially healthy utilities are operating in those states even though under the pre-*Mobile* procedure of the Federal Power Commission they have been required to bear unilateral increases imposed by their pipeline suppliers before they are able to secure relief under the scheme of the state statutes. The *Mobile* doctrine as applied here eliminates this inequity. Pipeline supplier and distributor are under the same rules.

The allegation that bankruptcy faces those pipelines that presently have rates in effect subject to refund if the *Memphis* decision stands will not bear analysis (F.P.C. Pet., pp. 27-28).<sup>21</sup> The claim that the amount is at least \$175,000,000 and possibly as much as \$240,000,000 is grossly exaggerated. First,

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<sup>20</sup> Arizona Revised Statutes Ann. (1956), Section 40-250; California Public Utilities Code, Section 454; Hawaii, Revised Laws, Section 4715 and Session Laws of 1947, Series A-69, Act 112; Idaho Code, Section 61-622; Kansas General Statutes Ann., Section 66-117; Michigan Statutes Ann., Section 22.13(6a); Montana Revised Code, Section 70-113; Ohio Rev. Code, Section 4909.17; South Dakota Code (1939), Section 52.0212; Wisconsin Statutes Ann., Section 196.20(2).

<sup>21</sup> A press release (No. 9602), issued by the Commission on December 27, 1957, shows total revenues subject to refund of \$202,938,912. The press release discloses that only five pipeline companies (Colorado Interstate Gas Company, United Gas Pipe Line Company, El Paso Natural Gas Company, Natural Gas Pipeline Company of America and Panhandle Eastern Pipe Line Company) account for \$173,672,954 or approximately 86% of the \$202,938,912. The balance is spread among 20 companies in amounts ranging from \$6,182 to \$5,995,813.

it ignores the fact that all sums required to be refunded are deductible for income tax purposes which at once reduces the net effect by approximately 52%. Second, it disregards the duplications inherent in the rate filings. To illustrate, United's proposed increase to the extent that it would increase the rates of Texas Gas and Southern is in turn reflected in Texas Gas' and Southern's pending, proposed increases to their customers. So that the total amounts cited by the Commission as subject to refund include the same increase several times.<sup>22</sup> Third, the total figures for pending rate cases are the amounts claimed by the pipelines, not necessarily the amounts they would be able to justify. In one case alone, *Colorado Interstate Gas Company*, Dockets No. G-2260 and G-2576, the decision of the Presiding Examiner (issued May 8, 1957) on the merits would require Colorado to refund over \$38,400,000<sup>23</sup> of the increase collected under bond, plus interest, or about one-half of the total amount so collected.<sup>24</sup> Fourth, the allegations

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<sup>22</sup> The extent of the duplications is revealed by the Commission in its Annual Report to Congress for 1955. It noted (p. 111) that almost all of the 31 proposals for increased rates filed by 25 pipeline companies were dependent upon the disposition to be made of the rate increase applications of only two companies.

<sup>23</sup> From "Petition of Colorado Interstate Gas Company to Reopen Consolidated Proceedings for the Purpose of Taking Additional Evidence" in Dockets No. G-2260 and G-2576, p. 5.

<sup>24</sup> Following the issuance of the Presiding Examiner's decision Colorado claimed it meant financial ruin to it (*Petition of Colorado Interstate Gas Co. to Reopen, etc.*, p. 3; *The Oil and Gas Journal*, November 25, 1957, pp. 66 and 67). We respectfully suggest that the Presiding Examiner's decision, rather than the decision below, may have influenced Colorado's deferment of a plan of expansion (Texas Gas Pet., p. 9, note), as may have the opposition of the Commission's staff to the project (Brief of Commission Staff

assume that all of the rates subject to refund are contained in rate contracts indistinguishable from United's. But the Commission itself admits to differences in the agreements between the various pipelines and their customers (F.P.C. Pet., p. 26, note 24) and some of the *amici curiae* expressly reserve the right to deny that the *Memphis* decision is applicable to their agreements (Motion of Natural Gas Pipeline Co., et al., p. 3, note 3).<sup>25</sup> Two of the factors above discussed are expressly recognized by Chairman Kuykendall in his speech to the New York Security Analysts, where he said:

"A number of the pipeline companies which would have to refund large sums would also receive large refunds from other pipeline companies from whom they have purchased. *Some would receive more than they would have to refund.* All companies which had to make refunds would have the right to obtain a refund of the resultant overpayment of income taxes."

Thus, the decision of the Court of Appeals will not have the "harmful consequences" (F.P.C. Pet., p. 13) which are baldly asserted by the Solicitor General and echoed by the other petitioners and *amici curiae*.

On the other hand, contrary to the Solicitor General's assertion (F.P.C. Pet., p. 13), the position for

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Counsel in Docket No. G-9966, pp. 32-33; Exceptions of Commission's Staff Counsel to Decision of Presiding Examiner, Docket No. G-9966).

<sup>25</sup> In an answer filed with the Commission on January 15, 1958, to a motion of the City and County of Denver to dismiss its rate filing in Docket No. G-11717, Colorado Interstate Gas Company asserts (p. 2) that "the *Memphis* case is inapplicable to it" because the rates which it proposes to change are Commission-prescribed rates under Section 5 of the Act—not contract rates.

which the Commission contends will not "be fair and just to the consumer of natural gas".

The facts as to sales for resale of natural gas for industrial use alone flatly contradict the Solicitor General. The Act (Section 4(e)) prohibits the suspension of rates for the sale for resale of gas for industrial use. Under the pre-*Mobile* procedure, therefore, for which the Commission contends, the proposed, unilateral increase in rates for industrial use gas became effective thirty days after filing and thereafter the purchaser was forced to pay the higher rate without recourse. For as to those rates, the Commission's decision may have only prospective effect. *Consequently even if the Commission ultimately found the increases unjustified, the pipeline company retained the collections unjustifiably made.* Under the pre-*Mobile* procedure, Mississippi, in this case, has been forced to pay without recourse, higher rates for industrial use gas to which it has not agreed, since November 1, 1955 (R. p. 143).

Under the pre-*Mobile* conception of the regulatory scheme, non-industrial *rate increases* went into effect under bond within six months of filing, despite the fact that they were made unilaterally. But in a proceeding for a *rate reduction*, under Section 5(a) of the Act since orders thereunder have only prospective effect the pipeline company retained any excessive rates collected *pendente lite*. General application of the *Mobile* doctrine will place rate increase proceedings on a parity with rate reduction proceedings, when the need for an adjustment of rates has been established, unless, in either case, there is mutual agreement upon the new rate. Cf. *Hope Natural Gas Co. v. Federal Power Commission* (C.A. 4), 196 F. 2d 803, 808-809.

Surely, a scheme of regulation which produces these inequities is not "fair and just to the consumers of natural gas", nor did Congress intend such inequities in legislation whose "primary aim \* \* \* was to protect consumers against exploitation at the hands of the natural gas companies". *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 611.

Under the pre-*Mobile* practices of the Commission, the pipelines, despite their long-term rate contracts with their customers, have been allowed by unilateral rate filings promptly to shift the incidence of increases in gas costs to their customers. This has destroyed the incentive of pipeline companies to keep down the cost of gas purchased from producers, for they have relatively little financial stake in the outcome of the bargaining.<sup>28</sup> These factors, coupled with the tremendous competition among pipelines for new gas reserves, have caused the current field price of gas to soar out of all proportion to the general economic trend. The best evidence of this is the fact, brought out by petitioners, that there are now pending with the Commission rate increase applications totaling \$175,000,000 per year, the greatest portion of which represents increases in costs of gas purchased from producers by the pipelines (Ohio Fuel *Amici Curiae*, p. 12).

Thus, the stability claimed by petitioners to have resulted from the pre-*Mobile* regulatory practices

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<sup>28</sup> In *Associated Oil and Gas Co.*, 17 F.P.C. 199, the Presiding Examiner, with Commission approval (17 F.P.C. 223), said (17 F.P.C. 220):

"It is believed that Trunkline would not have been so easily persuaded that the advantages of the proposal justified the increase in the cost of its operation were it not for the fact that in such situations the added costs fall not upon the pipeline but actually upon the pipeline's customers."

(F.P.C. Pet., p. 26) appears to be chimerical rather than real.<sup>27</sup> Stability will result, not from power to initiate rate increases at will, but from a rule which gives meaning to existing long-term rate contracts and thereby forces cost-consciousness on pipelines in their search for new gas.

As this Court stated in *Mobile* (350 U.S. at 344-345):

"Our conclusion that the Natural Gas Act does not empower natural gas companies unilaterally to change their contracts fully promotes the purposes of the Act. By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. \* \* \* On the other hand, denying to natural gas companies the

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<sup>27</sup> The Commission in its 1953 Annual Report to Congress (p. 100) described the situation created by the unilateral filing of rate increases as "serious" and the procedure of collecting the "higher rates under bond" as "unsatisfactory, burdensome and presents many difficult problems for the (pipeline) company as well as for the distribution utilities which must pay the higher rates". The "problem of distributing impounded funds to consumers in the event that proposed rate increases are denied even in part" was described as "time-consuming and expensive". The unilateral filing of rate increase proposals has been the bane of existence of the distribution companies and has undermined consumer confidence in the desirability of using natural gas.

In a motion filed with the Commission on January 8, 1958 in Docket No. G-11717. (p. 2), Colorado Interstate Gas Company moved for a postponement of its rate proceeding in Docket No. G-11717 in order to negotiate with its customers for a settlement of all of its pending rate cases because its "financial situation has been \* \* \* obscured for over four years" due to the regulatory situation. *FPC Press Release No. 9625*, dated January 14, 1958. The Oil and Gas Journal of November 25, 1957, page 67, also reported that Colorado "is in the position of having operated for almost 4 years without knowing what its earnings are" because its rates "have been unsettled since January 1, 1954". The same Journal reported that this was not an isolated situation.

power unilaterally to change their contracts in no way impairs the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest. The Act thus affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other.

"It may be noted also that this interpretation, while precluding natural gas companies from unilaterally changing their contracts simply because it is in their private interests to do so, *does not deprive them of an avenue of relief when their interests coincide with the public interest*. Section 5(a) authorizes the Commission to investigate rates not only 'upon complaint of any State, municipality, State commission, or gas distributing company' but also 'upon its own motion'. Thus, while natural gas companies are understandably not given the same explicit standing to complain of their own contracts as are those who represent the public interest or those who might be discriminated against, there is nothing to prevent them from furnishing to the Commission any relevant information and requesting it to initiate an investigation on its own motion. And if the Commission, after hearing, determines the contract rate to be so low as to conflict with the public interest, it may under § 5(a) authorize the natural gas company to file a schedule increasing the rate."

The decision below has been established to be a correct interpretation of the Natural Gas Act and a correct application of the *Mobile* case to the case at bar. No facts have been established which would indicate that this case would have the far-reaching consequences envisioned by petitioners and the *amici curiae*. The *Memphis* case merely gives to the *Mobile* case the general application it was intended to have.

## CONCLUSION

The decision of the Court of Appeals is correct. There is admittedly no inter-circuit conflict and there is no intra-circuit conflict.<sup>28</sup> No question is presented which would warrant further review by this Court.

Accordingly, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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January, 1958

<sup>28</sup> Of no merit is the claim of some of the petitioners, in which the Solicitor General does not join (Texas Gas Pet., p. 18; United Pet., p. 27), of an "intra-circuit conflict" in reliance on *Portsmouth Gas Company v. Federal Power Commission*, 247 F. 2d 90, and *Cincinnati Gas and Electric Company v. Federal Power Commission*, 246 F. 2d 688. In the *Portsmouth* case, the Court never reached the question here presented for it remanded the case to the Commission to ascertain the exact contractual situation between the parties (247 F. 2d 94-95). In the *Cincinnati* case, the Court dismissed the petition for review for want of petitioner's standing to sue, but noted that "there has been no unilateral change in rates fixed by contract" (246 F. 2d 693).

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1958

NOV. 23, 25 AND 26

**UNITED GAS PIPE LINE COMPANY, ET AL.,** *Petitioners*

**v.**

**MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.**

On Writs of Certiorari to the United States Court of Appeals  
for the District of Columbia Circuit

**BRIEF OF MEMPHIS LIGHT, GAS AND WATER  
DIVISION, THE CITY OF MEMPHIS, TENNESSEE,  
AND MISSISSIPPI VALLEY GAS COMPANY**

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October, 1958

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1958

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Nos. 23, 25 AND 26

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UNITED GAS PIPE LINE COMPANY, ET AL., *Petitioners*

v.

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.

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On Writs of Certiorari to the United States Court of Appeals  
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**BRIEF OF MEMPHIS LIGHT, GAS AND WATER  
DIVISION, THE CITY OF MEMPHIS, TENNESSEE,  
AND MISSISSIPPI VALLEY GAS COMPANY**

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**OPINIONS BELOW**

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 263-271) is reported at 250 F. 2d 402. The opinion of the Federal Power Commission (R. 224-237) is reported at 16 F.P.C. 19 and at 15 P.U.R. 3d 279.

**JURISDICTION**

The judgment of the Court of Appeals was entered November 21, 1957 (R. 272). The petitions for writs of certiorari in Nos. 23, 25 and 26 were filed on December 27, 29 and 31, 1957, respectively. They were

granted on February 3, 1958 and the cases consolidated. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

### QUESTIONS PRESENTED

Long-term contracts for the purchase and sale of natural gas provide:

"All gas delivered hereunder shall be paid for by Buyer under Seller's rate schedule (here is inserted the appropriate rate schedule designation), or any effective superseding rate schedules on file with the Federal Power Commission."

The Federal Power Commission construed such language as constituting an agreement on a procedure for changing rates, which contemplated a filing by the seller with the Federal Power Commission of a proposed new rate, opposition thereto by the buyers, and decision by the Commission, after hearing, approving such rate or prescribing such other rate as it determined to be justified. On the basis of such construction the Commission held that unilateral contract rate increases could be filed by a pipeline company under Section 4(d) of the Natural Gas Act. The Court below reversed on the authority of *United Gas Pipe Line Company v. Mobile Gas Service Corporation*, 350 U.S. 332.

The questions presented are:

- (1) Assuming that there was agreement on a rate-changing procedure, does the Commission have jurisdiction to accept a filing of proposed increased rates which have not been agreed to by the buyer?

- (2) May the quoted language of the contract reasonably be interpreted as agreement on a rate-changing procedure?

The court below answered the first question in the negative and, therefore, did not reach the second question.

### **STATEMENT OF THE CASE**

#### **Introductory:**

Respondent Memphis Light, Gas and Water Division is a Division and wholly-owned agency of the City of Memphis, Tennessee. In addition to its electric and water properties, the Division owns and operates a natural-gas distribution system for the distribution and sale of natural gas throughout the City of Memphis and in Shelby County, Tennessee, to approximately one-half million domestic, commercial and industrial consumers. The interests of the Division and the City of Memphis in these cases are identical, and they will be hereinafter jointly referred to as "Memphis." Memphis purchases its entire supply of natural gas from Petitioner Texas Gas Transmission Corporation (hereinafter "Texas Gas") which is an interstate natural gas pipeline company. Texas Gas, in turn, obtains substantial volumes of natural gas by purchase from Petitioner United Gas Pipe Line Company (hereinafter "United"). (R. 119<sup>1</sup>).

Respondent Mississippi Valley Gas Company (hereinafter "Mississippi") is a natural-gas distribution company engaged in the distribution and sale of natural gas locally to domestic, commercial and indus-

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<sup>1</sup> "R. ——" will refer to the printed record. "T. ——" will refer to unprinted portions of the record as certified to the court below by the Federal Power Commission.

trial consumers in the cities of Jackson, Bolton, Edwards, Raymond, and their environs in Hinds County, Mississippi. It purchases a substantial volume of its natural gas supply directly from United and a further substantial volume indirectly from United through purchases from Texas Gas and Petitioner Southern Natural Gas Company (hereinafter "Southern"), another interstate natural gas pipeline company which purchases from United (R. 131).

The supply arrangements between United as seller, and Texas Gas, Southern and Mississippi as purchasers, are governed by long-term contracts, called "service agreements" under the Federal Power Commission's Regulations (18 C.F.R. §§ 154.12 and 154.85; FPC Br., Appendix A, pp. 123, 127), each of which is on file with the Federal Power Commission (hereinafter "Commission") and specifies (by reference) the rates agreed to by the contracting parties. *United Gas Pipe Line Company*, 13 F. P. C. —, Opinion No. 277, issued November 2, 1954.

The proceedings now before this Court began in 1955 when United, purporting to act under the authority of Section 4(d) of the Natural Gas Act (15 U.S.C. § 717c(d)<sup>2</sup>), tendered for filing proposed increases in its contract rates for the sale of natural gas for resale in interstate commerce to Mississippi, Texas Gas and Southern, among others. By agreement between Texas Gas and all of its customers, Texas Gas is entitled to reimbursement for such increases in the cost to it of gas purchased from United as might result from United's proposals. *Texas Gas Transmission Corporation*, Docket No. G-2017, 14 F.P.C. — (1955); see FPC

<sup>2</sup> For the text of this section, see FPC Br., Appendix A, p. 119.

Orders at 20 F.R. 8088, 8977 (1955). Thus, both respondents are directly and immediately affected by United's purported rate increases (R. 265-266).<sup>3</sup>

### **Background of the Controversy:**

United has been selling natural gas under long-term contracts to Texas Gas, Southern, and Mississippi for many years. United's contractual relationship with Texas Gas and its predecessor, Memphis Natural Gas Company, dates back at least to 1945 (R. 101, 105, 114), with Southern to the same year (R. 84), and with Mississippi to 1947 (R. 51).

Until the Commission in 1948 promulgated regulations governing the "form, composition and filing of schedules of rates and charges" (13 F.R. 6371), United's contracts for sales of natural gas to Texas Gas, Southern and Mississippi were on file with the Commission as United's rate schedules. In 1948, however, the Commission, by Order No. 144, promulgated regulations (13 F.R. 6371) "governing the form, composition and filing of schedules of rates and charges \* \* \* so as to achieve uniformity and simplicity" and thereby "enable a ready location of the rate and determination of what the rate in fact is"—a task which had become complicated and confusing under "the prior permissible practice of filing contracts as rate schedules, with unlimited supplementation." See: Federal Power Commission Brief, pp. 14, 42-43, in No. 10125, C.A.D.C., *United Gas Pipe Line Company v. Federal Power Commission* (181 F. 2d 796). Of these regulations, the Commission said (Presiding

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<sup>3</sup> As a direct customer of United, Mississippi is in this status, too, directly and immediately affected by United's rate increase proposals (R. 265).

Examiner's decision in *Colorado Interstate Gas Company*, 8 FPC 509, 554, adopted by the Commission, 8 FPC 313):

"\* \* \* the Commission's purpose in promulgating order No. 144 was precisely as is stated in its explanatory opinion, to-wit: that the proposed amendment of its General Rules and Regulations was for the sole purpose of achieving uniformity and simplicity with respect to the form, composition and filing of schedules of rates and charges for the transportation and sale for resale of natural gas in interstate commerce."

The regulations provided that any existing contract on file with the Commission as an effective rate schedule "may be continued in effect and shall be considered as an executed service agreement" (Section 154.85, FPC Br., Appendix A, pp. 127-128), but was to be restated in the format required by Order No. 144 (Section 154.82, FPC Br., Appendix A, p. 127).

When United finally complied with Order No. 144 in 1952, its existing contracts with Texas Gas, Southern and Mississippi, theretofore on file with the Commission as the effective rate schedules, continued as executed service agreements under Order No. 144.

Thereafter, at various dates, all but two of the original sales contracts with Texas Gas, Southern and Mississippi have been superseded through the execution by them of United's standard form service agreement. As a consequence, at the times pertinent to the disposition of the issues in this case, United served Texas Gas, Southern and Mississippi under five standard form contracts and under two original sales contracts executed by United with Texas Gas on April 16, 1945 and with Southern on May 7, 1951, all of which were on

file with the Commission at rates agreed to by the parties to the contracts and approved by the Commission on November 2, 1954, in Opinion No. 277. *United Gas Pipe Line Company, 13 F.P.C. —.*<sup>4</sup>

Thus, both before and after Order No. 144 all sales of natural gas were made by United to Texas Gas, Southern and Mississippi under contracts.

#### **The Present Proceedings:**

On September 30, 1955, United, purporting to act under the authority of Section 4(d) of the Act, filed proposals to increase by approximately \$9,978,000 annually its contract rates for sales of natural gas for resale for domestic, commercial and industrial purposes (R. 115-116). These proposals would impose annual increases in rates to Mississippi, Texas Gas and Southern of \$872,152, \$1,134,776 and \$1,201,784, respectively.<sup>5</sup> No customer of United had agreed to the proposed increase in rates. (Texas Gas Br., p. 4; FPC Br., p. 3; R. 267-268).

On October 26, 1955, the Commission ordered a hearing to inquire into the reasonableness of the proposed rate increases filed by United. By "Order Suspending Proposed Increases in Rates" the Commission suspended the "proposed rate increase" as to domestic and commercial rates for the statutory five-month

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<sup>4</sup> As identified by the Commission (R. 230, note 2), the pertinent contracts with Mississippi are three in number dated March 25, 1955 (R. 61-74); with Southern are dated May 7, 1951 and September 30, 1952 (R. 84-88, 92-99), and with Texas Gas are dated April 16, 1945 and August 11, 1952 (R. 101-108, 108-115).

<sup>5</sup> United has since filed three additional unilateral rate increase proposals imposing further increases. (Note 38, *infra*, p. 65).

period on the ground that "the increased rates and charges proposed" had not been justified and might be unlawful (R. 115; 116). The proposed industrial rate increases to Mississippi were not suspended since Section 4(e) (pursuant to which the Commission was purportedly acting) does not permit suspension of industrial rates, and the higher rates have been paid by Mississippi since November, 1955,<sup>6</sup> without power according to the Commission, to require refunds (*infra*, pp. 63-64).

Memphis, Mississippi and a number of others, including petitioners Texas Gas and Southern, intervened in the proceedings before the Commission to contest the new rates sought by United (R. 141, 267-268; Texas Gas Br., p. 4; FPC Br., p. 3). In February, 1956, during the pendency of the hearing before the Commission, this Court issued its decision in *United Gas Pipe Line Company v. Mobile Gas Service Corporation*, 350 U. S. 332 (hereinafter "*Mobile*"), holding that a gas seller could not unilaterally increase its contract rates for gas, and that the Commission is without jurisdiction to accept a filing under Section 4(d) purporting to effect such a unilateral change, since Section 4(d) does not provide for the "filing of 'proposals.' " The section authorizes and requires notification to the Commission of new rates on which the parties had agreed, rates which, but for the notice requirement of Section 4(d), would be fully enforceable as a matter of contract alone.

Memphis and Mississippi thereupon moved for rejection of United's filing (R. 143, 162), and for a re-

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<sup>6</sup> United's three additional unilateral rate increase proposals have proposed further increases in these rates (Note 38, *infra*, p. 65).

fund of the increases in industrial rates (which had not been suspended) on the ground that United's filing of new rates which had not been agreed upon by its contract customers was illegal under Section 4(d) as construed in the *Mobile* decision.<sup>7</sup>

The pipeline company petitioners resisted these motions (R. 149, 167, 171, 173) on the theory that United's unilateral abrogation of the contract rates was authorized under the following provision appearing in five of the rate contracts here involved:<sup>8</sup>

**"PRICE**

"All gas delivered hereunder shall be paid for by Buyer under Seller's rate schedule (appropriate rate schedule designation), or any effective superseding rate schedules, on file with the Federal Power Commission."

United, Texas Gas and Southern argued that the "effective superseding rate schedules" provision must be interpreted in the light of their misconception, held

<sup>7</sup> The rates which were suspended have been paid since April 1, 1956, the end of the suspension period (R. 117), subject to refund.

<sup>8</sup> This provision appears in each contract except the contracts dated April 16, 1945 with Texas Gas and May 7, 1951 with Southern. The Commission contends, however, that the provision became a part of these contracts through the amendment of the price provisions of these contracts by United's tariff (FPC Br., p. 115, note 65). For purposes of its decision the court below assumed, without deciding, that all seven contracts contained the same provisions (R. 266, note 2). Texas Gas and Southern do not join in the Commission's claim (Texas Gas Br., p. 3, note). The same argument was made without success by United in *Mobile* (United Reply Br., Oct. Term, 1955, No. 17, p. 9) and was unsuccessfully urged by the Commission in *Tyler Gas Service Company v. Federal Power Commission*, 247 F. 2d 590, 593, certiorari denied, 355 U.S. 895.

prior to the *Mobile* decision, that Section 4(d) of the Act provided a rate-changing procedure which authorized the seller to file proposed changes in contract rates, the contract purchaser to oppose such proposals, and the Commission to act as arbitrator of the dispute between the contracting parties (R. 3, 4, 160, 169-170, 171-172, 173-174, 186, 188-189).<sup>9</sup> Therefore, they contended (R. 170, 171-172, 173-174, 179-180, 187-188) that the contract provision, construed in the light of this misconception of the scheme of regulation provided by the Act, amounted to a contractual grant of power to United to file proposed changes in contract rates notwithstanding the lack of agreement of the purchasers to the new rates.<sup>10</sup>

The Commission upheld the contentions of the pipeline company petitioners and denied the motions of respondents to reject the rates (R. 224-237). The Commission ruled (R. 236-237) that "United's *proposal* for increased rates in this proceeding does not constitute a prohibited unilateral change of a contract, for the contract language (the "any effective superseding rate schedules" provision) supplies the purchaser's assent to United's *filing* of a change in rates."<sup>11</sup>

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<sup>9</sup> In the court below (R. 253) United stated that "such Service Agreements must be construed in such light rather than in the light of the decisions subsequently rendered by the United States Supreme Court in the cases of *United Gas Pipe Line Company v. Mobile Gas Service Corporation* (1956), 350 U. S. 332, and *Federal Power Commission v. Sierra Pacific Power Company* (1956), 350 U. S. 348 \* \* \*."

<sup>10</sup> Mississippi did not concur in the interpretation placed on the provision by United, Texas Gas and Southern; and Mississippi argued that the provision was no more than an agreement to pay superseding rates made effective in a legal manner (R. 193, 282).

<sup>11</sup> Unless otherwise stated, italics and parentheses appearing in quotations are supplied.

On review, the court of appeals unanimously reversed the order denying respondents' motions to reject the rate filings (R. 263-271). The court assumed, without deciding, that the "effective superseding rate schedules" provision may be interpreted as indicating implied consent to "the act of filing,"<sup>12</sup> although not consent to the new rates themselves. But the court below held that consent to "the act of filing" was not enough to validate the filing under Section 4(d), since this Court had held in *Mobile* that only *bona fide*, agreed changes in contract rates may be filed with the Commission under Section 4(d) and reviewed under Section 4(e) (R. 267, 268-271).

The judgment of the court of appeals requires the Commission to reject the filings made by United and to initiate appropriate proceedings to secure refunds of the rates paid to United since they were erroneously allowed to become effective (R. 271).

### SUMMARY OF ARGUMENT

A. The test laid down in the *Mobile* case for eligibility for filing of a contract rate change under Section 4(d) of the Natural Gas Act is not met here. There was no agreed-upon rate change. The pipelines contended and the Commission concluded that an agreement upon a rate-changing procedure was to be inferred from certain contract language.

Under this rate-changing procedure, United was to have the right to propose new rates to the Commission.

<sup>12</sup> The Commission's holding as to the meaning of the "effective superseding rate schedules" provision is challenged by respondents (*infra*, pp. 48-71). In view of its holding on the assumption that the Commission's interpretation of the provision was correct, the court below did not reach respondents' challenge.

by a unilateral filing under Section 4(d), the customers were to have the right to oppose United's proposed new rate, and the Commission was to hear and determine the contest and prescribe such rate as it found appropriate. The asserted arrangement was aptly described by two of the petitioners, Southern and United, as essentially an arbitration procedure, with the Commission selected by the parties to act as arbitrator.

Respondents deny that the contracts may properly be construed as providing for a rate-changing procedure. But if the correctness of such construction be assumed for purposes of decision (as it was by the court below), it is nevertheless clear under *Mobile* that the Commission would not have jurisdiction to give effect to contract rate changes not agreed to by the contracting parties. The court below correctly held that the *Mobile* rule precludes converting the notification procedure of Section 4(d) into a mechanism by which a pipeline company may change contract rates unilaterally.

As construed by this Court in *Mobile*, the Natural Gas Act grants to the Commission no power to make rates initially, or to assist the parties in negotiating new rates, but only the power to review rates agreed to by the parties. Section 4(d) provides only a method for notification to the Commission and the public of agreed-upon changes in previous rates. Thereafter, the proceedings under Section 4(e) are for review by the Commission of the rates agreed to by the contracting parties to determine whether such rates are in the public interest. Section 4 provides no rate-changing procedure at all.

Petitioners in their briefs in this Court, have rephrased their contentions as to their contracts, now

claiming that there was agreement of all customers to pay *any* rate which United might file and which the Commission would approve. The new phraseology does not change the decisive fact that United had not completed the effectuation of its rate increase when it filed the new rates—it had no contract right to the *filed* rates, but only to whatever rates might be *approved* by the Commission.

Since Section 4 provides for no arbitration proceedings, and gives the Commission no power to make rate changes, the Commission was without jurisdiction to accept United's proposed rates. The function which United was asking the Commission to perform—to consider its proposal and to arbitrate its dispute—was one which the Commission lacked statutory power to perform.

The construction of the statute adopted by the court below does not impair United's freedom to contract. Absent the Act, United could not modify its contract rates simply by giving public notice of a change. Under the Act, as before, United may negotiate with its customers for a change in rates, and upon successful completion of negotiations may effectuate the new rates. The Act merely requires notification to the Commission and gives an opportunity for Commission review of the new rate agreement.

Petitioners' contention that the tariff and service agreement system established by the Commission is basically *ex parte* in character cannot be sustained. Moreover, the contention would be irrelevant unless it could be established that valid rules prohibit bilateral contractual agreements. Nothing in the Commission's regulations precludes such agreements; on the contrary

the regulations and practice of the Commission favor them.

The purpose of the regulations was only to achieve simplicity and uniformity as to the form of arrangements between pipeline companies and their customers. The regulations define a service agreement (such as United's contracts in this case) as a contract, and expressly forbid a change except by a superseding service agreement executed by the customer.

When the Commission promulgated its regulations it provided that pre-existing rate contracts should remain effective until "replaced" by service agreements, thus indicating that service agreements performed the same function as the prior contracts. In the language of the *Mobile* opinion, "the Act expressly recognizes that rates to particular customers may be set by individual contracts." If the Act has not deprived natural gas companies and their customers of the right to set rates by contract, then the Commission cannot do so by administrative fiat. Although the term "*ex parte*" occurs in the *Mobile* opinion, it is used only with reference to the fixing of rates to prospective customers. The opinion makes clear that rates to customers already under contract may be "change(d) only by mutual agreement."

Superficial similarities between the Natural Gas Act and the Interstate Commerce Act do not, as *Mobile* makes clear, support the contention that the rate-making methods are the same under statutes dealing with markedly different industries.

The *Mobile* decision establishes that the scheme of the Natural Gas Act is founded upon encouragement of stable contractual relationships conducive to stim-

ulating the heavy capital investments which are necessary to healthy development of the industry.

B. The decision of the court below should also be sustained upon another ground, not reached by that court. Contrary to petitioners' contentions, the rate contracts, properly construed, do *not* include an agreement upon a procedure for changing rates; yet such an agreement is the only factor relied upon by petitioners to distinguish the instant contracts from the contract in *Mobile*.

No agreement upon a rate-changing procedure is expressed in the consent to pay in accordance with "any effective superseding rate schedules on file with the Federal Power Commission." The express agreement is to pay a new rate *only* when it has become "effective" to "supersede" an existing rate. The act of filing does not confer effectiveness unless the filing is valid. Thus the rates found in *Mobile* to be a nullity had been filed with the Commission, but the Commission exceeded its authority in accepting them for filing.

Nor does the contract language import an implied agreement that the act of filing shall make effective a rate change which would otherwise be of no effect. Indeed, the right of contract purchasers to resist proposed rate increases filed by the sellers is recognized by both the Commission and the pipeline companies.

Thus the legal effect of the quoted language is merely to make certain that both parties remain bound by their other contractual obligations even if the rate provision of their contract should be altered by exercise of the paramount power of the Commission to modify contracts in the public interest. Such paramount power may be exercised through review of agreed rate

changes under Section 4(e), or through review of existing rates under Section 5(a).

The Commission's contention that the "traditional" method of rate-changing must be read into the contract is unsound. That method was based upon the pre-*Mobile* misconception that the Act—not the contract—conferred power upon pipelines to file unilateral increases. To read the contract language as an affirmative grant of power to make rate filings violates the rule requiring strict construction against the draftsman of the contract, and ignores the contemporaneous evidence of intent. At one time the form of contract which United submitted to the Commission contained an express reservation of the seller's "right to revise its rates," but United dropped that provision from its contract. Petitioners now seek to read into the "effective superseding rate schedules" provision the wholly different provision which had been voluntarily deleted by United.

The contention that the contract language is intended to reserve an unconditional right to propose a change in rates would, if accepted, make the contract unlawful under the Commission's regulations. Section 154.38(d)(3) requires that a contractual reservation of a right to increase rates must express the "certain specified conditions" under which the right may be exercised, and the section is strictly construed. If it had the right claimed, United would have an unrestricted, *carte blanche* authority to propose rate increases in direct violation of this regulation.

The interpretation for which the Commission and the pipeline companies contend would be wholly unconscionable as applied to sales for resale for industrial

use only. The Commission has no authority to suspend increases in rates for gas sold for industrial use, nor any power to require refunds of unreasonable increases in such rates. *Section 4(e)*. Under the practice defended by the Commission, the distributor must pay without recourse any rate for industrial-use gas which his pipeline supplier chooses to exact, from 30 days after the time the rate is filed until the final order in the administrative proceeding. Only when the final order is issued fixing a reasonable rate, may the distributor be relieved prospectively of the perhaps exorbitant rate to which it has been subjected for a period of many months, or even years. Then, as soon as relief is obtained, a new filing may repeat the whole process. It is unreasonable to believe that any distributor would voluntarily sign a gas purchase contract with the intent to grant his supplier power to make unilateral rate increases which cannot be suspended, and as to which the Commission has no power to order refunds.

Upon the basis of statistics not pertinent to the issue, the Commission apparently urges that the sales of gas for resale for industrial use only are of little significance. In fact, however, industrial sales are of great significance in the economy of distribution and have a major effect upon the feasibility of supplying gas to domestic consumers at reasonable rates. In the case of Mississippi, for example, sales for industrial purposes represent 64.9% of the volume purchased from United and 43.7% of revenues derived from sale of gas purchased from United. If petitioners prevail in this case, regulation of industrial gas rates (and, to a considerable degree, gas rate regulation generally) will be rendered impotent and futile because of the

ability of the pipeline companies to *charge, collect* and *retain* excessive industrial rates. Subsequent Commission decisions as to reasonableness would be, as applied to past periods, mere advisory opinions. As a result of this regulatory vacuum, the stability found in *Mobile* to be so necessary in this industry would be impossible of achievement.

## II.

Petitioners' predictions of calamity flowing from the decision below are not relevant to a disposition of the issues of this case. To the extent, however, that the effect of the decision may be considered in applying the policy of the Act, it is clear that petitioners' predictions are based on speculation which experience has demonstrated to be unfounded. Since the decision below was announced in November, 1957, the following has occurred:

1. Pipeline companies in particular and the natural gas industry in general have continued their phenomenal growth and expansion.
2. Pipeline company security issues have received very favorable market reception.
3. Pipeline companies have been able to negotiate rate adjustments with their customers, in some cases cleaning up rate problems which had dragged along for years.
4. Such negotiated agreements have been accomplished without discrimination or preferences and within the framework of the Commission's regulations.

A unilateral rate change procedure does not, as petitioners contend, protect the interests of consumers and their distribution companies:

1. A unilateral rate change procedure enables the pipeline company to impose and exact at will, without power in the Commission to suspend and require refunds, any rate change the pipeline company chooses to impose for sales for resale for industrial use only. This jeopardizes the ability of a distribution company to retain industrial loads which are essential to enable it to sell gas to domestic consumers at rates within their reach.
2. Where the power of refund does exist, refunds do not restore to distribution companies the residential space-heating and industrial customers who may be irretrievably lost to competitive fuels by the imposition of the excessive rates. As the Commission has stated to Congress, the procedure of collecting higher rates subject to refund is "unsatisfactory, burdensome and present(s) many difficult problems for the (pipeline) company as well as for the distribution companies which must pay higher rates."
3. Under the unilateral rate-change procedure the distributor has been forced to operate for protracted periods in uncertainty as to its actual cost of gas purchased, a cost which usually represents more than 60% of a distributor's total operating expense.
4. The unilateral rate change procedure has become a device to secure from distributors and

consumers capital funds for additions and working capital purposes without adequate compensation for the use of the funds thus arbitrarily exacted.

5. Under the unilateral rate change procedure, pipeline companies have had no incentive to keep down the cost of gas purchased from producers since the burden of the cost is promptly shifted to distributor and consumer.

## ARGUMENT

### Introduction

This case involves an indirect, but basic, assault upon the rule of law laid down by this Court in the *Mobile* case. In that case this Court, in a unanimous decision, held that Section 4 of the Natural Gas Act does not provide a mechanism for unilateral changing of contract rates, but provides only for the filing by pipeline companies, and review by the Commission, of new rates that have been agreed to by the parties to the contract. Changes proposed unilaterally could be adopted by the Commission, but only *after* a plenary proceeding with findings based upon evidence in a Section 5(a) proceeding (350 U.S. at 345). The statutory language, the scheme of the Act, and the nature of the industry were authoritatively analyzed, and this Court's holding was stated in terms so explicit that it might reasonably have been anticipated that if the Commission and the pipeline companies felt the decision to be unacceptable they would have recognized that the remedy lies with Congress.

Instead of seeking amendment of the Natural Gas Act, the Commission and the pipeline companies have

seized on the present case as a vehicle for attempted erosion of the *Mobile* doctrine, an attempt unanimously rejected by the court below. Respondents respectfully submit that the attempt should meet with equally short shrift before the tribunal which decided *Mobile*.

This case, as *Mobile*, deals with contracts in the natural gas industry, an industry whose growth and progress depend, as this Court recognized in *Mobile*, on long-term relationships that furnish a climate in which the large investments necessary may be made by distribution companies and their customers with reasonable confidence in a stable gas supply at stable prices.

Here, as in *Mobile*, rates agreed upon by a pipeline company and its contract purchasers are sought to be changed by unilateral filings under Section 4(d) of the Act; here, as in *Mobile*, the contract purchasers have not agreed to the rate increases and are contesting them. In its effort to restrict the *Mobile* doctrine, the Commission has relied upon contract language which it construes (without substantial basis) as importing an agreement upon a filing procedure. From this unsound premise, the Commission proceeds to the conclusion, unjustified even on the Commission's premise, that an agreement between the parties for the filing of rates *which have not been agreed upon* confers jurisdiction on the Commission to accept such rates for filing. Thus, the effect of the Commission's argument is that the parties have power to confer jurisdiction that Congress withheld.

The elaborate brief filed by the Commission in an effort to overturn the decision below is quite illuminating. Much of it is devoted to an economic argument not based on facts of record, and which would more

appropriately be addressed to a legislative body than to a judicial tribunal. A considerable effort is made to show that the contract system under which natural gas is sold in interstate commerce is not what it appears to be. The Court is asked to believe that contract rates (except in the precise situation involved in *Mobile*) are really *ex parte* rates, and that purchasers are not entitled to expect rate stability. Indeed, the Commission at present comes perilously close to espousing the view that a healthy gas industry will exist only under conditions in which repeated gas rate increases can be imposed by sellers at will.

The Commission's attitude is most clearly revealed in its cursory treatment of the industrial rate problem. Because rates filed under Section 4 for sales of gas for industrial use only cannot be suspended pending review by the Commission, and the Commission has held itself powerless to order refund of payments based upon rates ultimately found to be unlawful, the Commission is in effect asking the Court to hold that the pipeline companies have *carte blanche* under the Act to impose, exact and retain excessive and unlawful charges for industrial gas sales. Since, as demonstrated in the argument which follows, industrial gas sales are of critical importance in the development of the industry and in making possible supplies of gas for domestic consumption at reasonable rates, the position taken by the Commission looks toward abdication of its responsibilities in an important area of regulation. Such abdication of responsibilities will not be permitted by the courts.<sup>18</sup>

<sup>18</sup> *Phillips Petroleum Company v. Wisconsin*, 347 U. S. 672, 679, citing *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U. S. 682. See also: *Wisconsin v. Federal Power*

In the argument that follows under Point I, respondents show (A) that even on the Commission's premise of an agreement between the parties on a rate-changing procedure, the decision of the court below is squarely within *Mobile*; and (B) that the deci-

*Commission*, 205 F. 2d 706, 707-708; *City of Detroit v. Federal Power Commission*, 230 F. 2d 810, *certiorari* denied, 352 U. S. 829; *New York Public Service Commission v. Federal Power Commission*, .... F. 2d .... (C.A. 3, Nos. 12401, 12403, decided June 30, 1958); *Natural Gas Pipeline Company of America v. Federal Power Commission*, 252 F. 2d 3, 8-9; *Mississippi River Fuel Corporation v. Federal Power Commission*, 252 F. 2d 619, *certiorari* denied, 78 S. Ct. 331. In the *Mississippi* case, the petitioner, a natural gas pipeline company was constrained to say (Brief of Mississippi River Fuel Corporation, OADC, No. 13,199, p. 17):

"This is not the first time, even in recent years, that this Court has been called upon to act as guardian of the public interest when this and other regulatory commissions have been derelict in their duties in carrying out Congressional mandates. In *Phillips Petroleum Company v. Wisconsin*, 205 F. 2d 706 (D.C. Cir. 1953), the Commission refused to exert its primary jurisdictional authority in this same field and it was necessary for this Court to issue the necessary instructions. The Supreme Court upheld this Court in unequivocal terms (347 U. S. 672 (1954)). In *Federal Power Commission v. Union Producing Company, et al.*, 230 F. 2d 36 (D.C. Cir., 1956), this Court rejected the attempt of Union to enjoin the Commission from enforcing the regulations applicable to independent producers. Its action was upheld by a denial of *certiorari* by the Supreme Court (351 U. S. 927 (1956)). The latest manifestation of this Court's concern for the effective administration of public regulatory statutes is found in its pronouncement in the *Panhandle* case requiring that cost data be submitted in such cases as these (*City of Detroit v. Federal Power Commission*, 230 F. 2d 810 (D.C. Cir., 1955)). The Supreme Court again upheld this Court by denying *certiorari* (*cert. denied* Oct. 8, 1956, Nos. 98, 113).

"Apparently, unless the Commission's functions are to fall into a condition of regulatory desuetude, this vigilance on the part of this Court must continue. No better example of such a necessity can be found than in this case."

sion below was correct for the further reason that on a proper interpretation of the contracts there was no actual agreement on a rate-changing procedure; consequently, the contracts in this case and in *Mobile* are indistinguishable.

Under Point II, respondents show that there is no basis for the predictions of adverse effects from the decision below on the natural gas industry, and that the decision below, like the *Mobile* decision, helps to insure the stability of supply arrangements essential to the health of the industry.

# I.

## THE ATTEMPTED UNILATERAL RATE INCREASES OF PETITIONER, UNITED GAS PIPE LINE COMPANY, WERE A NULLITY.

### A. AGREEMENT ON A RATE-CHANGING PROCEDURE DOES NOT CONFER JURISDICTION ON THE COMMISSION TO GIVE EFFECT TO CONTRACT RATE CHANGES NOT AGREED TO BY THE CONTRACTING PARTIES.

#### 1. The Sales Contracts, as Construed by the Petitioners Provide Only an Agreement on a Rate-Changing Procedure.

Before the Commission the pipeline petitioners made no claim of the existence of an agreement on the specific rates proposed by United (R. 267-268; Texas Gas Br., p. 4; Federal Power Commission Br., pp. 2, 35). The pipeline petitioners were of a single mind in asserting that the "effective superseding rate schedules" provision of the contracts was agreement only on a rate-changing procedure<sup>14</sup> (R. 3-4, 153-154, 159).

<sup>14</sup> Respondents, for purposes of this part only, accept the petitioners' interpretation of the provision of the contract as agreement on a rate-changing procedure. *Infra*, pp. 48-71, respondents show that the pipeline petitioners' interpretation, shared by the Commission, is without support in the record and that, on a proper interpretation of the provision, the contracts in this case and in *Mobile* are indistinguishable.

160, 168, 171-174), or as United succinctly puts it (United Br., p. 49) "these words imported a mechanism for rate changes."<sup>15</sup> Indeed, with respect to the very rate-changing procedure which, prior to *Mobile*, the Commission and the industry generally, "*United included*" (R. 186), had thought Section 4(d) provided. United, author of the provision, explained that (R. 153-154)—

"It was and is the intent and meaning of such language, and was so understood by the parties, that such provision contemplated freedom and right by United as Seller to file with the Federal Power Commission, pursuant to Section 4(d) of the Act, notice of change in rates, \* \* \* with consequent freedom and right in Mississippi Valley, Texas Gas, Southern Natural and all others similarly situated to oppose and contest both the propriety and lawfulness of the noticed change in rates. \* \* \*

"Thus, there was mutual understanding and agreement that effective rates in a pending tariff were subject to notice of change filed with the Commission \* \* \* followed by full right to oppose and contest such change or review with the effec-

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<sup>15</sup> United variously concedes that its filings were made "*pursuant to a procedure provided by (the) service agreements*" (United Br., p. 2); that the agreements afford "*an agreed machinery of change theretofore operated by the parties*" (*id.*, p. 6) and "*provide for the method of price change employed by*" United (*id.*, p. 34); that the provision is "*explicit contractual provision for the method of change approved by the Commission*" and was intended "*to invoke the machinery for rate change it described*" (*id.*, p. 15); that the agreements stipulate "*a machinery of price change*" (*id.*, p. 36) and "*embody consent to an agreed mechanism of change*" (*id.*, p. 37); that the "*procedure thus utilized is that erected by the Act itself*" (*id.*, pp. 41-42); and that the words of the "*effective superseding rate schedules*" provision "*imported a mechanism for rate change*" (*id.*, p. 49).

tive tariff rates superseded by such change in tariff rates as became effective pursuant to Commission review and determination of the contest, if any, of the propriety and lawfulness of the noticed change \* \* \*."

With specific reference to its service agreement with Mississippi, United stated to the Commission that the "effective superseding rate schedules" provision (R. 159-160)—

"\* \* \* contemplated change in tariff rates in terms of noticed change by Seller by filing to the Commission, which change would supersede pending tariff rates *when effective pursuant to Commission order*. \* \* \* The Purchaser was free to oppose and contest any noticed change; the Seller to resist any reduction sought. The provision was offered and understood as drawn in the gloss of United's contentions and understandings in the Mobile<sup>16</sup> and Tyler<sup>17</sup> cases."

Texas Gas, for its part, indicated that its understanding of the contract provision was identical to that of United by adopting as its own United's explanation of the intent and meaning thereof (R. 171-172, 173-174), and further asserted (R. 3) that "the language in \* \* \* United's form of service agreement \* \* \* clearly contemplated the right from time to time in United to file for a change in rate under Section 4 of the Natural Gas Act."

<sup>16</sup> In *Mobile*, United and the Commission contended that a natural gas company could "initiate" unilateral contract changes under a "rate-changing procedure" thought to be provided by Sections 4(d) and (e) of the Act. (350 U. S. 340-341)

<sup>17</sup> *Tyler Gas Service Company v. United Gas Pipe Line Company*, (C. A. 5) 217 F. 2d 73, which involved a question similar to the one decided in *Mobile*, but was decided on a procedural point.

Southern, also in accord, said (R. 168) that the service agreement—

“\* \* \* grants to United the *right to file* with the Commission under the provisions of Section 4(d) changes in the rate schedules under which Southern purchases natural gas, subject, of course, to Southern's right to oppose any such changed rates in a proceeding before the Commission in respect thereto initiated under Section 4(e) or 5(a) of the Act.”

In essence, the claimed agreement was an arbitration procedure in which the parties appointed the Commission as the arbitrator. In fact, Southern and United expressed it just that way. Southern, through its counsel, stated (R. 4):

“\* \* \* There is absolutely no reason in law or in common sense why a natural gas company and a purchaser of its gas cannot lawfully agree that the rates specified in the contract *may be submitted to arbitration by either of the parties*. And that, in essence, is exactly what has been done by the parties to United's service agreements, which clearly contemplate that the Seller may submit to the Commission under Section 4(d) changes in rates *with the Commission acting as the arbitrator* between the parties under its powers granted by Sections 4(d) and 4(e), and in accordance with the standards established by Sections 4(a) and 4(b) of the Act.”

And United said (R. 208-209, 211):

“\* \* \* (T)he intent of the parties in such language was in essence a filing subject to the opposition and contest of the other party to the contract and equally *subject to the arbitrament* of the re-

view which the Commission had undoubted power to make \* \* \*."

"\* \* \* the parties are free to agree 'for United to propose' and the other parties to the Service Agreement to oppose."

Accepting the interpretation placed upon the contracts by United, Southern and Texas Gas, the Commission held that United's filing was authorized because "the contract language supplies the purchaser's assent to United's filing of a change in rates" (R. 237), and denied respondents' motions. The Commission clearly recognized that the right granted to United by the service agreements as interpreted by the pipeline petitioners was a right only to *make a filing*—to make a *proposal* for an increase in rates. (R. 234-237). Thus the Commission said: "Hearings in respect to these increased rate *proposals* were commenced on January 6, 1956 \* \* \*" (R. 225); "\* \* \* the changes contemplated by the agreements were *unilateral* changes to be *proposed* by United" (R. 231); "\* \* \* parties may still agree between themselves to the *filing* of changes in rates such as *proposed* by United in this proceeding" (R. 236); "United's *proposal* for increased rates in this proceeding does not constitute a prohibited unilateral change of a contract \* \* \*" (R. 236).

## 2. The Decision of the Court of Appeals Is Squarely Within Mobile.

The court of appeals unanimously reversed the Commission's order denying respondents' motions to reject the proposed changes in rates (R. 263-271).

The court below (per Judge Washington) noted that "in every pertinent aspect save one"—the existence of the "effective superseding rate schedules" provision in the contracts—this case is "a close copy of *Mobile*" (R. 266). The court recognized that each case involved an attempt by a pipeline company to increase contract rates for gas without obtaining agreement of its contract customers to the proposed new rate (R. 267-268). Each case involved an attempt to use the Section 4 notification procedure as a method of unilaterally imposing rate changes.

The court accepted for purposes of decision only (R. 267) (as respondents do here only for purposes of this part<sup>18</sup>) the Commission's interpretation of the contract as providing "contractual consent to the *act of filing*" but rejected the Commission's position that this was sufficient to make the new rate schedules eligible for filing under Section 4(d) and review under Section 4(e) of the Act. (R. 268-270) The court pointed out that (R. 267):

"\* \* \* Correct though the Commission's statement of the parties' intent may be, it does not answer the question whether the Commission has jurisdiction to accept such a schedule for filing and to proceed under Section 4(e) to review United's filing of a new rate, where the level of the new rate itself has not been previously agreed upon by the parties to the contract."

The only purpose of the filing required by Section 4(d) is, the court emphasized (R. 268) to give

<sup>18</sup> *Infra*, pp. 48-71, respondents show that the Commission's interpretation of the provision is without support in the record and that on a proper interpretation of the provision the contracts in this case and in *Mobile* are indistinguishable.

"notice of the fact that the contracting parties have reformed their contract: that the seller has offered, and the buyer has agreed to, a particular new price to be effective no less than thirty days after the Commission is notified of the change."

"It is only at this point," the Court said (R. 268), "after the parties have negotiated privately a new price term—that the Commission, under Section 4(d) and (e), in any way becomes involved with the rate changing process" (italics the court's). For the "Commission to review rates under the more expeditious procedure of Section 4(e), the seller must bring to the Commission a negotiated agreement." (R. 268). "Nothing in Section 4(e) gives the Commission authority to assist the parties in negotiating a new price term." (R. 268).

The decision below is a proper application of the principles established in *Mobile* to a basically similar factual situation, as a review of this Court's *Mobile* decision quickly reveals.

The question presented in *Mobile*, as this Court stated at the outset of its opinion (350 U.S. at 333-334), was "whether under the Natural Gas Act \* \* \* a regulated natural gas company furnishing gas to a distributing company under a long-term contract may, without the consent of the distributing company, change the rate specified in the contract simply by filing a new rate schedule with the Federal Power Commission." The question presented (350 U.S. at 337), was "solely one of the proper interpretation of the Natural Gas Act". The answer to the question was found, not in the terms of the particular contract involved, but in the terms of the Act. The Act recognizes the need for private contracts to permit "the

stability of supply arrangements which all agree is essential to the health of the natural gas industry", since transactions in that industry, unlike those supervised by the Interstate Commerce Commission, "typically require substantial investment in capacity and facilities for the service of a particular distributor" (350 U.S. at 338, 339, 344, 345), and by the distributor and consumer, as is here conceded (FPC Br., p. 44).<sup>19</sup>

<sup>19</sup> The efforts of petitioners to restrict the holding of *Mobile* to its precise facts ignore the fact that the Court's decision is addressed to the broad question presented, and are also in contrast with the Commission's and United's representations to this Court on petitions for certiorari in *Mobile*.

Ironically, petitioner United urged in its petition for certiorari in the *Mobile* case (Pet., Oct. Term, 1955, No. 17, p. 8) that "The decision below squarely presents broad and highly important questions of interpretation of the principal affirmative provisions of Section 4 of the Act in such way, Petitioner submits, as to nullify the provisions of Section 4" since, United asserted, "all rates" between natural gas companies and their purchasers under the Natural Gas Act "depend on contract whether 'common law', by virtue of a signed service agreement, mere service acceptance or otherwise \* \* \*" (Pet., *Ibid.*, p. 11). Having lost *Mobile*, United argues in this case (United Pet., p. 11) that "The *Mobile* case dealt only with, and its rationale is limited to, a specific contract, conditioned for a term and at a price upon a known resale arrangement."

And the Solicitor General's petition in *Mobile* (Pet., Oct. Term, 1955, No. 31, p. 23) urged that the "issue decided by the court below is one of importance in the administration of the Natural Gas Act and, in addition, of the Federal Power Act." "The regulation in the public interest of rates for natural gas and electricity," the Solicitor General stated (*ibid.*), "would be retarded for the court below would require that all rate increase proposals which involve existing contracts would be subservient to the actions of the parties to the contract." Now, however, the Solicitor General asserts (FPC Pet., pp. 15, 16) that "*Mobile* was based not upon the broad ground that sales were being made pursuant to a general agreement \* \* \* but rather upon the specific circumstance that the particular contract prescribed a specific

This Court held that Section 4(d), which requires filing of notice of rate changes thirty days in advance, is not a grant of power to change contract rates (350 U.S. at 339). Absent the Act, a unilateral announcement of a change to a contract would be a nullity, and Section 4(d) was not intended to make effective what otherwise would be of no effect at all (Id.).

The Act "merely defines the *review* powers of the Commission" (Id. at 341). "The basic power of the Commission is that given it by § 5(a) to set aside and modify any rate or contract which it determines, after hearing, to be 'unjust, unreasonable, unduly discriminatory or preferential'" (Ibid.). "This is neither a 'rate-making' nor a 'rate-changing' procedure. *It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them*" (Id. at 341). Neither is Section 4 a rate-making or a rate-changing procedure; it only adds to this basic power the powers of suspension and refunds with respect to newly changed rates—the "scope and purpose of the Commission's review remains the same \* \* \*" (Ibid.).

"Section 4(d) provides not for the filing of 'proposals' but for notice to the Commission of any 'change . . . made by' a natural gas company, *and the change is effected, if at all, not by an order of the Commission but solely by virtue of the natural gas company's own action. If the purported change is one the natural gas*

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*rate and contained no contractual mechanism for effectuating rate changes*"; that there are actually only 18 contracts of the type involved in *Mobile* (FPC Br., p. 6, note 7); and that rates in all other purchase and sale arrangements are really *ex parte* (FPC Br., p. 39).

company has the power to make, the 'change' is completed upon compliance with the notice requirement. . . . (Id. at 342).

"In short, the Act provides no 'procedure' either for making or changing rates; it provides only for notice to the Commission of the rates established by natural gas companies and for review by the Commission of those rates" (Id. at 343; italics the Court's).

From this analysis of the Act, this Court concluded that the "obvious implication is that, except as specifically limited by the Act, the rate making powers of natural gas companies were to be no different from those they would possess in the absence of the Act," which this Court defined as the power (350 U.S. at 343):

"to establish *ex parte*, and change at will, the rates offered to *prospective* customers; or to fix by contract, and change *only by mutual agreement*, the rate agreed upon with a particular customer."

The change in a contract rate with a particular customer must be consummated—the Seller must have already perfected its contractual right to it—before the Commission is empowered to review it.

The decisive fact in this case is that United does not here possess a consummated contract right to establish the rate which it filed with the Commission. Absent the Act it would have no right to enforce the proposed rates against its contract purchasers as a matter of private contract.<sup>20</sup>

<sup>20</sup> The cases cited and petitioners' arguments based thereon (FPC Br., p. 36, note 23; Texas Gas Br., p. 18; United Br., pp. 41-48) with regard to the enforceability of an agreement to pay

Accordingly; the following statement, which represents the crux of the decision below, is wholly consistent with the analysis provided in *Mobile* (R. 269-270).

“For these reasons, we hold that since United had not obtained the consent of its contract customers to the rate itself—albeit some of those customers may have consented to the act of filing—the Federal Power Commission had no power to file the new rate schedules under Section 4(d)

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a price to be ascertained by reference to definite and readily available data in accordance with a formula specified in the contract are beside the point. There is no formula specified in the contracts; no agreement on a formula; and no definitive formula permitting the ascertainment of the price by reference to definite and readily available data. Undoubtedly the “just and reasonable” standard of the Act has been held sufficiently definitive for constitutional purposes to sustain the delegation of legislative authority to an administrative agency, but it does not follow that it is sufficiently definitive to sustain the enforceability of a rate as a matter of contract. This Court has noted that (*Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246, 251) “Statutory reasonableness is an *abstract* quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high.” Additionally, the Commission itself has argued in its brief (FPC Br., pp. 90-91, 95-96) that the data and facts are not readily ascertainable, involving “many difficult and complicated engineering, accounting, and economic issues, on which the parties and their experts may be in sharp disagreement, before an ultimate determination of costs and lawful rates can be made.” Moreover, the “just and reasonable” concept is by no means definite and fixed. It connotes no formula. *Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591, 600, 602. As to rate base, it may be fair value or cost. Under each of these the rate is different. Even as to other components, the concept is not fixed and definite and certain. Thus, the Commission has sought, and is still seeking, to use the value of gas in the field for a pipeline company’s own gas production instead of actual cost (the former resulting in higher rates).

and therefore could not review the new rate pursuant to Section 4(e). It is not sufficient for a Section 4(d) filing that United's customers have consented to allow United to have the Commission invoke Section 4(e) to review a rate increase during the contract term, where the parties have not agreed to the specific rate. Doubtless the contracting parties could have agreed on a third party to arbitrate a dispute when the seller sought to raise its price. But the Federal Power Commission has not been given that arbitration function by statute."

As both decisions make clear, the Commission's power is limited by the Act to "review" of new agreed rates filed under Section 4, and to review of existing rates through Commission action, after hearing, pursuant to Section 5(a). Thus, new agreed contract rates initially may be placed in effect by the parties (Section 4(d)) and new rates may be ordered by the Commission after hearing (Sections 4(e) and 5(a)). Under no circumstances, however, may changes in contract rates *be established unilaterally by a seller*.

Under the decision of the court below, United is deprived of no contractual powers. Prior to the Act, it had the right to negotiate for new rates privately with its customers and to change the rate by mutual agreement. This right remains unaffected. Such negotiated rate may be established at any time, subject only to the condition that notification of the change be filed with the Commission before the new rate is made effective, and that the rate be an agreed-to rate (350 U.S. at 343). Indeed, Texas Gas exercised that freedom of contract subsequent to the *Memphis* decision when it negotiated an agreement for a rate increase and on December 20, 1957, filed the requisite notice under Section 4(d) of agreed-to changes in rates with respondents

and all but one of its other customers. FPC Release No. 9643, January 20, 1958.

This freedom of contract may include, as the court below pointed out, the selection of a third party to arbitrate the matter of new rates (R. 269-270). But it does not include, as petitioners are forced to concede (FPC Br., p. 52; United Br., p. 32),<sup>21</sup> the power to appoint the Commission to assist the parties in negotiating a new price term (R. 270-271) through the "initiation of a rate change"<sup>22</sup> (FPC Br., p. 35).

<sup>21</sup> "Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable, they must be conferred by Congress." *Federal Trade Commission v. Radlam Co.*, 283 U. S. 643, 649. "When Congress passes an act empowering administrative agencies to carry on governmental activities, the power of these agencies is circumscribed by the authority granted." *Stark v. Wickard*, 321 U. S. 288, 309. It cannot be enlarged by private agreements. *American Airlines v. Air Line Pilots Association*, 91 F. Supp. 629, 632.

<sup>22</sup> The Commission, in arguments reminiscent of its position in *Mobile* asserts (FPC Br., p. 35) that the parties agreed to "the initiation of a rate-change" and that the filing "set in motion the rate-change provisions of Section 4(d) of the Act"; and United asserts (Br., pp. 41-42) that the "procedure thus utilized is that erected by the Act itself." These phrases that are sprinkled throughout the briefs of petitioners point up the fact that neither the Commission nor United has ever accepted the interpretation of Section 4(d) definitively established in *Mobile*, as providing "not for the filing of 'proposals' but for notice to the Commission" of a rate to which the seller has perfected its contractual right, which is effected, if at all, not by an order of the Commission, but solely by virtue of the natural gas company's own action (350 U. S. 341, 342). To the Commission and United, Section 4(d) still sets up a rate-making or a rate-changing procedure under which the natural gas company initiates unilateral contract changes. The difference is that before *Mobile* the Commission and United argued that the Act provided the procedure for making or changing rates, but now they argue that the contracts provide the procedure.

Thus, even assuming that the "effective superseding rate schedules" provision constituted an agreement on a procedure for changing rates and that the *Mobile* contract did not contain such an agreement, it is clear that this distinction is not material under *Mobile*.

Petitioners seek to avoid the force of the decision below by making two somewhat inconsistent alternative arguments to the effect that—

- (a) there was an agreement upon the part of purchasers to pay any rate filed by Sellers unless and until such rate should be disapproved by the Commission, or
- (b) the "contracts" here are really contracts in form only as to rates, and what is intended is an *ex parte* rate system which, as between the parties, is under the exclusive control of Sellers.

(a) Apparently realizing, in the face of the decision below, that agreement on a rate-changing procedure alone is insufficient for Section 4(d), the petitioners attempt to rewrite their prior construction of their contracts and that of the Commission (as set forth *supra* pp. 24-28). The argument now is to the effect that the customers agreed to pay any rate which United might file and which the Commission should allow to become effective.<sup>23</sup>

<sup>23</sup> The Commission says "they had contracted to pay any rate on file with the Commission, including rate changes made under Section 4(d) which the Commission permits to become effective in accordance with the Act \* \* \*" (FPC Br., p. 35). United states that "(w)hat the customers consented to \* \* \* was the substitution of the superseding rate for the former rate upon its becoming effective' pursuant to the procedures which the Act empowers and describes." (United Br., p. 31). Texas Gas and Southern contend for an agreement "that such changes could be filed by United

But even this new phraseology is insufficient to avoid the decisive effect of the fact that United had no consummated contractual right to the rates which it filed. The petitioners must still concede that the agreement was not to pay the rate which United might file, but only to pay the rate which the Commission made effective. (e.g., R. 154).

Thus viewed, it is clear that the purported change is not effected solely by virtue of the natural gas company's own action, but is effected by an order of the Commission. The changed rate to which agreement is claimed is not completed upon compliance with the notice requirement of Section 4, but only upon the final order of the Commission. But this Court in *Mobile* said that "the change is effected, if at all, not by an order of the Commission but solely by virtue of the natural gas company's own action." "If the purported change is one the natural gas company has the power to make, the 'change' is completed upon compliance with the notice requirement \* \* \*." (350 U.S. at 342).

In order to give their contracts, as now re-construed, an appearance of a firm agreement upon a new rate, it has been necessary for Texas Gas and Southern Natural to deny that the service agreement purports to give an arbitration function to the Commission (Texas Gas Br., p. 22). This completely repudiates Southern's statement of record to the effect that the service agreements "clearly contemplate" that the Commission shall act "as the arbitrator." (R. 4). The eloquence

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under § 4(d) of the Act (R., 236), and that United's customers agreed to pay such rates upon their becoming effective after notice under § 4(d) or after suspension, review and possible modification under § 4(e) of the Act (R. 231)." (Texas Gas Br., p. 10)

with which the new construction is argued fails to conceal the glaring inconsistency between petitioners' present contentions and the record.

(b) To avoid the decisive fact that United does not possess the essential contract rights to the proposed rates, pinpointed by the decision of the court of appeals, the Commission makes still another effort to rewrite its decision and the record. It argues that under the tariff and service agreement system of rate filings prescribed by Order No. 144 (13 F.R. 6371, et seq., 18 C.F.R. 154.1, et seq.), rates lost their contractual character and became "virtually, if not entirely, *ex parte*" (FPC Br., pp. 15, 39) and the method of rate making became "as close to an *ex parte* method of rate making as would be practicable in the natural gas industry, where some agreement on terms and duration is required to protect heavy investments by both buyer and seller" (FPC Br., pp. 16, 44).

The regulations adopted by Order No. 144, however, affected no matter of substance and did not change the contractual nature of the relationship as to rates, term and other conditions of service. The purpose of the regulations, governing *form* and *manner* of filing, was only to achieve uniformity and simplicity and to enable ready location of the rate and to ascertain what the rate in fact was (Federal Power Commission Brief, pp. 14, 42-43, C.A.D.C., No. 10125, *United Gas Pipe Line Company v. Federal Power Commission*, 181 F. 2d 796).

A review of the contents of the tariff, as prescribed by the regulations, reveals (1) that objectives of the tariff were uniformity and simplicity, and (2) that there was no intent to alter the contractual basis of

buyer-seller relationships. The tariff was to consist of (Sections 154.11, 154.34, 154.36, 154.38; FPC Br., Appendix A. pp. 122-124; Appendix to United Br., pp. 14a, 15a.):

- (1) Table of contents
- (2) Preliminary statement describing the company's operations, policies and practices.
- (3) Map of the system
- (4) Rate schedules—showing the rates or charges and types of service available thereunder
- (5) General terms and conditions of service
- (6) Unexecuted forms of service agreements
- (7) Index of purchasers.

No special form of service agreement was prescribed. Other than indicating some of the subjects to be included in the service agreement the regulations left to the natural gas company the authorship of the form of service agreement it wished to adopt.<sup>24</sup>

No attempt was made by the Commission to dictate the substance or the form of service agreements, nor to limit the natural gas company in the number of different kinds and types of service agreements it might adopt.

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<sup>24</sup> The form of "service agreement," which was to be submitted as part of the tariff, was to "provide for insertion of such items as the name of the purchaser, service to be rendered, area to be served, maximum obligation to deliver, delivery points, delivery pressure, *applicable rate schedules by reference to the tariff*, effective date and term, and identification of any prior agreement being superseded" (Section 154.40, FPC Br., Appendix A, p. 125).

The regulations specifically defined the term "contract" to include an executed service agreement, and "any agreement which in any manner affects or relates to rates." (Section 154.12, FPC Br., Appendix A, p. 123). These provisions clearly recognized the contractual basis for seller—purchaser relationships under the tariff-service agreement system.

Nowhere in the regulations is there contained any prohibition against bilateral contracts. The bilateral nature of the service agreement was emphasized by the provision of the regulations that "a change or revision of an executed service agreement shall be in the form of a superseding, *executed* service agreement only." (Section 154.63, Appendix to United Br., p. 37a). This expressly forbids a unilateral change in service agreements, which include "applicable rate schedules by reference to the tariff." Section 154.40, *ibid.*, p. 17a.

Consistent with its recognition of the contractual basis of the relationship and contractual rights of the parties, the Commission expressly authorized the continuation of existing contracts as executed service agreements until they expired or were replaced by "an *executed* service agreement in a form contained in the tariff." (Section 154.85, FPC Br., Appendix A, pp. 127-128).<sup>25</sup>

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<sup>25</sup> The effect or absence of effect of the regulations upon existing contracts was stated thus by the Commission in *Colorado Interstate Gas Company*, 8 FPC 313, 318:

"When the goal sought by the issuance of order No. 144 is kept constantly in mind, it seems perfectly obvious that section 154.85 of such order is mandatory to the extent that each contract which is now filed as an effective rate schedule shall be continued in effect until changed in accordance with the Natural Gas Act. Unless section 154.85 is so interpreted, we would have a situation where one party to a contract could abrogate such contract in its entirety under color of a regula-

The very fact that the old contracts remained effective until "replaced" by service agreements shows that the function of the service agreement was identical to that of its predecessor contract. A principal function of the old contract was to establish the contractual rate. The function of the service agreements remained the same; the rate, the very heart of the arrangement, was expressly included by reference as an integral part of the contract.

The fact that the change from existing contracts to service agreements was one of form and not substance was emphasized by the Commission in its statement to the court of appeals in *United Gas Pipe Line Company v. Federal Power Commission*, C.A.D.C., No. 10125, 181 F. 2d 796, a case involving an attack by United on the validity of the Commission's regulations (Federal Power Commission Brief in that case, p. 55):

"We have shown that the regulations in no wise impair existing contracts and that their requirements as to the future stipulate the *form* of contract and the *manner* in which the rate must be specified."<sup>20</sup> (Italics the Commission's)

tory agency's rule that is restricted to the form and composition of rate schedules, but without the consent or acquiescence of other parties to such contracts. The Order as a whole and section 154.85 thereof do not admit of any such strained construction. And the claim that Order No. 144 in and of itself terminated the 1931 contract is, it is believed, utterly without merit."

<sup>20</sup> When United Gas Pipe Line Company sought review of Order No. 144 in the Court of Appeals for the D.C. Circuit (see *United Gas Pipe Line Company v. Federal Power Commission*, 181 F. 2d 796) and challenged its validity on the ground that the regulations affected substantive changes in its contracts and deprived it of contractual rights without a hearing, contrary to the requirements

The Commission argues (FPC Br., pp. 5, 40, 41) that there is no "fixed" price "stated" in the service agreement, and therefore no contract as to rates. But the fact that the rate is made a part of the agreement by reference does not make it any less definite or any less a part of the contract. Both the rate schedule and the general terms and conditions of service are expressly included in United's service agreements, which state that " \* \* \* the applicable provisions of such rate schedules" and the "General Terms and Conditions" of its tariff "are by reference *made a part hereof*." (R. 64 (Article IV), 70 (Article V), 74d-74e (Article V), 97 (Article IV), 112-113 (Article IV)).

The provisions of the service agreement, to be sure, have in many respects been standardized and made uniform by the pipeline companies and sales are often made at the same rate to many customers, but this does not, as the Commission appears to believe (FPC

of Section 5(a) of the Act, the Commission, referred to this provision and stated to the Court that "So far as the foregoing regulations affect existing contracts, therefore, it is plain that no impairment results." The Commission, in "a binding assurance," accepted by the court (181 F. 2d at 799), stated that it "interprets its Order No. 144 as not authorizing the making of any change in an effective rate, charge or contract provision, without compliance with the Natural Gas Act, as amended." (Federal Power Commission Brief, p. 49, C.A.D.C., No. 10125, *United Gas Pipe Line Company v. Federal Power Commission* (181 F. 2d 796)). Further, the Commission asserted that the regulations do not result in: "any unlawful restriction upon future freedom of contract. Clearly, the prohibition against unlimited supplementation, requiring substitution in the form of a single written instrument, *affects no matter of substance*. Nor do the specifications as to the manner in which tariffs, rate schedules, and service agreements shall be filed. Likewise, the requirement as to how a proper rate shall be stated *affects only the mechanics for statement*, requiring no change in such rate."

Br., pp. 40, 43-44) alter the fact that the relationship between the parties and the rate, are contractual.

In fact, in *Mobile*, United agreed that this was the case. It there conceded that "all rates" between natural gas companies and their purchasers under the Act "*depend on contract* whether 'common law', *by virtue of a signed service agreement*, mere service acceptance or otherwise \* \* \* (United Pet., Oct. Term, 1955, No. 17, p. 11)

This is confirmed by United's tariff which provides (R. 5):

"The sale of natural gas is undertaken by the Company *only under a Service Agreement* with purchasers *acceptable to the Company* after consideration of its commitments to others, supplies of natural gas, delivery capacity and other factors deemed pertinent to the Company."

The Commission nevertheless contends that the system which it established constituted an *ex parte* system of rates and that there is nothing in the Act or in *Mobile* which prohibits an "*ex parte*" system of rate-making (FPC Br., p. 44). Actually the question is whether there is anything in the Act which *authorizes* the Commission to require that natural gas companies and their customers submit to a system whereby rates are not established by mutual agreement. This Court said in *Mobile* (350 U.S. at 338-339):

"\* \* \* the Act expressly recognizes that rates to particular customers may be set by individual contracts. \* \* \* (T)he Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts \* \* \*"

Elsewhere the Court pointed out that the "initial rate-making \* \* \* powers of natural gas companies remain \* \* \* unaffected by the Act." (350 U.S. at 343).

If the Act has not deprived the natural gas companies and their customers of the right to set rates by contract, then the Commission cannot, by administrative fiat, establish an "*ex parte*" system which denies the parties the right to contract for rates.

The argument for treatment of United's rates to its long-term customers as *ex parte* stems from a misreading of a single phrase in the *Mobile* opinion in which the Court referred to "*ex parte* \* \* \* rates offered to prospective customers." The phrase is to be read in context. The Court first emphasized (350 U.S. at 343) that the ordinary common law rights and powers of natural gas companies to make and change rates were not affected by the Act; that is to say, the Act conferred no rate-making or rate-changing power upon a natural gas company which it did not already possess. It is evident that the common law rights of a seller of natural gas would be the same as those of any other supplier of merchandise: as to those with whom he had no contractual relations—his *prospective* customers—he was free to place any price he pleased upon his product. But when the supplier entered into a long-term contract to furnish his product to a *particular* customer, he could alter the bilateral contract only by mutual agreement.

Thus, since the Act does not affect the common-law rate-making and rate-changing powers of natural gas companies—

"The obvious implication is that, except as specifically limited by the Act, the rate-making powers

of natural gas companies were to be no different from those they would possess in the absence of the Act: to establish *ex parte*, and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer." (350 U.S. at 343)

The Commission concludes from the above language that, where the original rate had been established *ex parte*, no consent by a purchaser under a long-term service agreement to a change in rates was necessary (FPC Br., p. 39). The quoted language supports no such conclusion. The fact that a seller may at common law establish *ex parte* his prices to prospective customers does not mean that the price remains "*ex parte*" when the prospective customer has become an existing customer with a long-term supply contract. The rate "established" *ex parte* is in reality nothing more than a standing offer, in the nature of a price list, which can be withdrawn or changed at will prior to acceptance. But when accepted it is no longer an *ex parte* offer but a binding mutual contract. Therefore, it is anomalous to speak of *ex parte* rates under existing long-term contracts.

The Commission still argues (FPC Br., pp. 45-47), as it did in *Mobile*, despite its rebuff there<sup>5</sup> (350 U.S. at 338-339, 345), that the "rate-making methods" of the Natural Gas Act were to be the same as those applicable under the Interstate Commerce Act, because the rate provisions of the former were derived from the language of the latter Act. That contention was rejected by this Court in *Mobile*, where it was pointed out that the system of the Natural

Gas Act was "in marked contrast to the Interstate Commerce Act." The differing natures of the industries were found to give rise to a "basic difference between the two Acts." (350 U.S. at 338).

Not only has the Commission erred in its analysis of the provisions of the Act and the rationale of the *Mobile* opinion, but its argument for "flexible", *ex parte* rates ignores one of the basic characteristics of the natural gas industry—the one which distinguishes it from the railroad industry and requires an entirely different kind of regulation. That characteristic is the requirement of stable supply arrangements. Its existence and importance were recognized by this Court when it said in *Mobile* (350 U.S. at 344):

"Our conclusion that the Natural Gas Act does not empower natural gas companies unilaterally to change their contracts fully promotes the purposes of the Act. By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. Conversion by consumers, particularly industrial users, to the use of natural gas may frequently require substantial investments which the consumer would be unwilling to make without long-term commitments from the distributor, and the distributor can hardly make such commitments if its supply contracts are subject to unilateral change by the natural gas company whenever its interests so dictate."

*Mobile* thus makes clear that there is no authorization in the Act for the Commission to establish a rate-making system which empowers the companies to make and change their contract rates *ex parte*.

The need for stability in the natural gas industry is underscored by comparing it with the railroad industry. In the case of railroad carriers, their published tariffs are available to all who tender goods for shipment and the carrier must accept the shipment. This is in the common law, public utility tradition. The contractual arrangement is made by the proffer and acceptance of the shipment and is concluded with the delivery of the goods. There are no long-term contracts, and the arrangement is satisfactory for there are no substantial investments required for a particular shipper, as contrasted with (FPC Br., p. 16) the case of buyer, seller and consumer in the gas industry. Because of the heavy investments usually required by pipeline company, distributor and consumer, such an arrangement would not do in the natural gas industry. Indeed, it is not too much to say that unless the arrangements were contractual and long-term there could not be a gas industry as we know it.

In view of the history of the tariff and service agreement regulations, their objective and the acknowledged need for stability of supply arrangements for a healthy gas industry from the industry and the consumer viewpoint, the Commission's present contention that the system is an *ex parte* system for the purchase and sale of natural gas disregards the characteristics of the industry, the objectives of the Act, and the Commission's responsibilities thereunder.

**B. THE SALES CONTRACTS HERE INVOLVED DO NOT  
AUTHORIZE FILING OF UNILATERAL RATE CHANGES.**

As has been noted, the Commission construed United's service agreements as providing an agreement upon a rate filing procedure which, the Commis-

sion thought, distinguished this case from *Mobile*. Respondents contended before the court below that this construction by the Commission was unwarranted on the basis of the language of the contract and the evidence. Since the court of appeals found that even an agreement upon a rate-filing procedure would not confer jurisdiction on the Commission to accept the purported filings, and ruled the filings unlawful on that basis, the court found it unnecessary to consider respondents' contention. It is here urged as an alternate ground in support of the judgment of the court of appeals.

1. The language of the contracts expresses only agreement by the parties to be bound to the other terms of the contract at rates lawfully established by the regulatory agency.

(a) The contracts in the case at bar may be searched in vain for any reference to a filing procedure or to an undertaking by the purchaser to be bound by rates proposed by the seller. The price provision reads as follows:

"All gas delivered hereunder shall be paid for by Buyer under Seller's rate schedule (appropriate rate schedule designation), or any effective superseding rate schedules, on file with the Federal Power Commission."

If this provision is construed in accordance with the ordinary meanings of the words used, it conveys merely that the parties recognize that, in this regulated industry there is an obligation to pay rates put in effect by the valid exercise of paramount Governmental authority. The provision in terms neither authorizes nor forbids the seller to take any steps avail-

able to it in seeking Commission action. Thus the contract provision does no more than recognize explicitly the overriding authority of the Federal Power Commission referred to in *Mobile* (350 U.S. at 344) to modify contracts in the public interest.

In *Mobile* the inadequacies of the statutory language relied upon to justify unilateral filings were analyzed by this Court in terms equally applicable to the *contractual* language similarly relied upon here by petitioners. The contractual provision "does not purport to say what is effective to" change the rate, nor does it "say under what circumstances a change can be made" (350 U.S. at 339). There is no basis in the language for inferring that the provision was intended "to make effective action which would otherwise be of no effect at all" (350 U.S. at 399). To find in the provision "a further purpose to empower natural gas companies to change their contracts unilaterally requires reading into it language that is neither there nor reasonably to be implied" (350 U.S. at 340). Indeed, to say that the provision represented agreement on a rate-changing procedure is to rewrite the provision.

On the face of it, the agreement is to pay a new rate *only* when it has become "effective"<sup>27</sup> to "supersede" the existing rate. Until the new schedule is an "effective superseding" one it may not affect the purchaser's existing rate.

Rates are not "effective superseding" rates simply because of the act of filing and their acceptance for

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<sup>27</sup> "Effective", of course, means "legally effective", as the Commission concedes (FPC Br., p. 103, note 59).

filing by the Commission, as the Commission suggests (FPC Br., pp. 52-54). Rates not eligible for filing, because not within the intendment of the Act and the agreement of the parties, never attain the status of "effective superseding" rates, notwithstanding their treatment as such by the Commission. This is clearly demonstrated by the *Mobile* case. The Commission accepted United's filing in that case, which was precisely of the same nature and character as the filings made in this case, and allowed it to go into effect. But, because it was never eligible for filing as an "effective superseding rate schedule", it never attained that status and was ordered rejected by this Court (350 U.S. at 347).

Certainly there is no agreement that the mere filing of the schedule will make it effective. If that were the intent then the word "effective" would have been omitted and the agreement would have been to pay under "any superseding rate schedule on file with the Federal Power Commission". The adjective is, however, a limitation upon the purchaser's obligation to pay *any* different rates whatsoever. The adjective places on United the burden to achieve effectiveness lawfully. Nowhere in the provision can agreement be found that new rates shall become effective simply by the filing of proposed new schedules with the Commission, followed by contested rate proceedings and a rate-changing order of the Commission.

The construction urged by respondents does not read the provision out of the contracts. The language makes certain that the purchaser must continue to buy and the seller to sell the quantities specified in the contract for the entire term even if the Com-

mission exercises its regulatory power to impose a rate other than the rate agreed upon by the parties. It precludes the defense of illegality or impossibility based upon the Commission's action; in effect, it makes Commission action a part of the contract. It precludes a party to the contract from contending that a change validly ordered by the Commission entitles the party to discontinue its sales or purchases thereunder and to dispose of or obtain its gas supplies elsewhere.

The Commission argues (FPC Br., pp. 101, 102, 104-105) that respondents' construction restricts the contractual provision to an agreement to pay only such new rates as may be legally established by the Commission after proceedings under Section 5(a). This misconceives respondents' construction of the contract provision. Respondents contend that legally effective rates can be established under Section 5(a) and under Section 4(d), *but in neither case by unilateral action of the seller*. Under Section 5(a), the seller may bring to the attention of the Commission "relevant information" and request the initiation of an investigation by the Commission on its own motion looking to the establishment of a new rate (350 U.S. at 345), but the new rate is legally established only by the Commission after a hearing and upon findings, based on evidence, that the existing rate is not in the public interest (350 U.S. at 345). Under Section 4(d) the rate is legally established by the filing by the seller of an agreed-to-rate. The Commission, however, in the exercise of its review powers, after hearing under Section 4(e), may establish a different rate. Under respondents' construction of the contract provision the obligation to continue the purchase and sale

under the rate established by the Commission would remain.<sup>28</sup>

(b) As has been noted, the interpretation of the provision as agreement on a rate-changing procedure finds no support in the express wording of the provision. The Commission does not contend that it does.\* Its contention is only that since the filing of new schedules under Section 4(d) has

<sup>28</sup> To illustrate, pursuant to renegotiation provisions of their long-term contracts, Texas Gas and Union Oil and Gas Corporation agreed on a new, higher price for gas to be paid to Union by Texas Gas. This was clearly an agreed-to rate eligible for filing under Section 4(d) and was so filed by Union (*Union Oil and Gas Corporation*, Docket No. G-11563). The Commission questioned the reasonableness of the rate agreed to and, under Section 4(e) embarked on a review proceeding. The Commission may, as a result of that proceeding, find that a different rate is reasonable, which Texas Gas will be required to pay and Union to accept without relieving either party of the obligations of its contract. This illustrates, also, that Sections 4(d) and (e) remain vital parts of the regulatory scheme, contrary to the Commission's claim (FPC R. 18, 63). It continues to have the very significance and importance intended by Congress—review for the protection of the ultimate consumers since their interests and those of the contracting parties are not always synonymous. Thus, in the Union Oil case several municipalities and distributors (all customers of Texas Gas), including the respondents in this case, are intervenors in opposition to the agreed-upon rate as excessive.

The continued vitality of Sections 4(d) and (e) of the Act is further illustrated by a recent agreed-upon rate increase filed under Section 4(d) by Texas Gas on August 15, 1958 to secure reimbursement from its customers of a gas gathering tax which Texas Gas is obligated to pay its producer-suppliers. Pursuant to a tax adjustment clause in Texas Gas' service agreements, its customers had agreed to reimburse Texas Gas for increases in specified additional taxes in accordance with a specified formula. Since the tax was within the scope of the agreement, the rate increase was contractually consummated and eligible for filing under Section 4(d).

traditionally been recognized by the Commission and the natural gas industry as an accepted method for increasing rates" (FPC Br., p. 104), the reading of the provision as "including revised rate schedules filed under that section would be fully in accord with this objective."<sup>29</sup> This argument does not, however, provide a basis for such a reading of the "effective superseding rate schedules" provision.

In the first place, prior to *Mobile*, the erroneous assumption of the Commission and of the industry generally was that the Act—not the "effective superseding rate schedules" provision of the agreements—conferred upon natural gas companies the right to file unilateral proposals for rate changes under Section 4(d) of the Act. Indeed, the interpretation now contended for by the petitioners was never advanced until after the decision in the *Mobile* case and the filing by respondents of their motions to reject. It was clearly an after-rationalization born of the *Mobile* decision and advanced to avoid it.<sup>30</sup> In the light of the general misconception of the regula-

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<sup>29</sup> This reiterates the position of the pipeline petitioners before the Commission and the court of appeals that the provision must be interpreted in the light of their misconception of the Act as authorizing a unilateral rate-changing procedure (*supra*, pp. 9-10, 26).

<sup>30</sup> Petitioners say that the shoe is on the other foot (Texas Gas Br., pp. 16-17); that it is respondents who are guilty of after-rationalization because their motions to reject were not made until after the *Mobile* decision. Since respondents' motions were based on the *Mobile* decision, they were naturally filed after the decision came down. At no time did respondents consider that the "effective superseding" provisions of the service agreements conferred any rights upon the seller to file proposals for rate changes. Until *Mobile* was decided, respondents, like petitioners, shared the same misconception of the Act and considered Section 4(d) as providing a procedure for unilateral rate change proposals.

tory scheme of the Act as to rates, which *Mobile* exposed, the more reasonable inference is that the parties intended no agreement on a rate-changing procedure by the "effective superseding rate schedules" provision.<sup>31</sup>

<sup>31</sup> Texas Gas' assertion (Texas Gas Br., pp. 10, 12) that it, like United, construed the "effective superseding rate schedules" provision as granting to United the right to file unilateral rate change proposals, flies in the face of, and cannot be reconciled with, the provisions of Texas Gas' service agreements, about 50 in number, with its customers. In addition to a provision that "Buyer agrees to pay Seller for all natural gas delivered hereunder at Seller's legally effective rate \* \* \*", Texas Gas' service agreements provide that "Seller may file with the Federal Power Commission \* \* \* for a change in the rates and charges effective as to the Buyer" on account of "any additional tax" as defined in the agreement, computed in accordance with a formula described in the provision. (The full text of the price provisions of Texas Gas' service agreements are reproduced in Appendix A to this Brief). Notwithstanding its customers' agreement to pay "Seller's legally effective rate," Texas Gas felt it necessary to provide in addition the right for itself to "file for a change in the rates and charges" when it needed to increase its rates to compensate for tax increases. If its own contract right to "legally effective" rates was insufficient, without more, to entitle it to file for an increase, then how can it construe United's right to "effective superseding rates" as conferring a right to file for an increase?

The large number of Texas Gas' service agreements also belies the claim (FPC Br., p. 110) of an industry understanding that the "effective superseding rate schedules" provision conferred the right to file unilateral rate change proposals.

Refutation of general industry construction of the provision as contended for by the Commission is also found in El Paso Natural Gas Company's contracts with Pacific Gas and Electric Company, Southern California Gas Company and Southern Counties Gas Company, entered into before the decision of the court below, which, in addition to providing that the buyer shall pay the rate on a specified rate schedule and the rates "lawfully in effect from time to time", provided that: "It is agreed that Seller shall have the right to make and file with the Federal Power Commission in accordance with Section 4 of the Natural Gas Act, changes in

In the second place, to read the provision as providing a rate-changing procedure does violence to the rule of contract interpretation that a contract is to be construed most strongly against the party drafting it. *Alcoa S.S. Co. v. United States*, 338 U.S. 421; *North American Graphite Corporation v. Allan*, 184 F. 2d 387; *Ulmann v. Sunset-McKee*, 221 F. 2d 128; *Hartford Fire Insurance Co. v. Foulke*, 134 F. Supp. 435; *Restatement of the Law of Contracts*, American Law Institute, Sec. 236 (d), pp. 328, 330. The "effective superseding rate schedules" provision—indeed the entire form of service agreement—was created, drafted and adopted by United, and accepted by the Commission for filing in 1952. It is not to be doubted that if a rate-change procedure was to be the subject of agreement between the parties, United was skillful and competent enough to draft an appropriate provision.

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these rates and new rates or rate schedules; provided, however, Buyer shall have the right to protest any such changes in rates and new rates or rate schedules before said Commission, and to exercise any other rights it may have with respect thereto under the Natural Gas Act, as amended, or as it may be amended, including Section 5 of such Act." *El Paso Natural Gas Company*, Docket No. G-12948, Opinion No. 308, 19 FPC 154, 156, note 5.

Additional refutation of a general industry understanding is found in Northern Natural Gas Company's revision of its service agreements in 1956, following the *Mobile* decision, to include a provision relative to its right to file proposed changes in rates under Section 4 of the Act, despite the existence of a provision in the service agreements that the customer agrees to pay the rate specified in a designated rate schedule "and as such rate schedule may be amended or superseded from time to time." (*Northern Natural Gas Company*, Docket No. G-11258, 16 F.P.C. 1076, and Order issued November 27, 1956). Naturally, Northern asserted that the additional provision "merely states more definitely the existing rights of itself and its utility customers . . ." (16 F.P.C. 1076).

1. The contemporaneous evidence of the draftsman's intent shows that no agreement on a rate-changing procedure was contemplated.

The only contemporaneous evidence of record as to the meaning of the provision shows conclusively (1) that United did not regard the "effective superseding rate schedules" provision as authorizing it to file proposed changes in rates, and (2) that it knew how to draft and did include such a provision in its form of service agreements, but because of its belief that the Commission might object to the phrasing and thus delay acceptance of its tariff, dropped it.

In May, 1952, United tendered to the Commission for approval its "proposed FPC Gas Tariff," prepared purportedly in the form and composition required by the Commission's Regulations (R. 283). The *General Terms and Conditions* of the tariff submitted by United for filing contained the following provision (R. 194-195):

"The rates established by Seller are designed to reflect Seller's cost of rendering service to provide a fair rate of return to Seller. In the event of an increase in Seller's cost, or of any change which would result in the rate of Seller providing less than a fair rate of return, *Seller shall have the right to revise its rates to reflect such change.* Such revised rates shall be charged only after they have been filed with the Federal Power Commission and become effective in accordance with its rules and regulations."

The *form of service agreement*, drafted by United and included in the tariff, contained this provision and additionally the "effective superseding rate schedules" provision. (R. 195)

The quoted provision never became effective. Pursuant to direction of the Commission (R. 287), the proposed tariff was rejected and returned to United as not in compliance with the regulations (R. 283). Among the items of non-compliance specified by the Commission was the inclusion of the above-quoted provision in the *General Terms and Conditions* "in contravention of Section 154.38(3) of the Commission's Rules" (R. 283).<sup>22</sup> The Commission advised that it (R. 283)—

"\* \* \* has not accepted for filing any rate schedules or tariffs filed pursuant to Part 154 of its present rules which contain proposals for the adjustment of rates by reason of escalator provisions where such proposals, contrary to the prohibitions contained in the rules, have been included in the rate schedule or general terms and conditions."

The Commission further advised (R. 283-284) that it—

"\* \* \* has accepted for filing tariffs when proposals respecting adjustment of rates by reason of rate escalator provisions are reflected in the *form of service agreements only* as permitted by the Commission's rules."

Thereafter, United tendered a revised tariff for filing *from which the proposed reservation of the right to seek changes in rates by a unilateral proposal was omitted* from the General Terms and Conditions and

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<sup>22</sup> Section 154.38 (3) provides that a natural gas company may include in its form of service agreement a provision "that it will be its privilege, under certain specified conditions, to propose to the Commission a modification, change or substitution of the then effective rate." (FPC Br., Appendix A, p. 125).

the form of service agreement (R. 287, 289-290). Explaining the deletion of the provision, United stated that (R. 290):

"\* \* \* in placing the foregoing provision in its Tariff (United) was under the impression that it was merely placing its customers on notice of its right and obligation to file reasonable rates, as provided by the Natural Gas Act. United was at that time under the impression that the provisions did not 'purport to effect the modification or change,' or 'purport to effect the substitution' of any other rate or charge.

"However, the provision is being stricken from Sheet 92 of the Tariff.

"The Commission's letter appears to indicate that the provision, which is also contained in the forms of service agreement on Sheets 98, 106, 111 and 112, and 116, may be satisfactory in such position in the Tariff, but it is not clear whether the Commission requires a rewording of the provision as submitted to be proper. Accordingly, to resolve any question, United has stricken the provision from the forms of service agreement."

From this contemporaneous evidence of intent of the draftsman of the agreement the conclusion is inescapable that United did not regard the "effective superseding rate schedules" provision as giving it contractual license to file rate-change proposals.<sup>23</sup>

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<sup>23</sup> Notwithstanding this evidence, the Commission argues (FPC Br., pp. 110-115) that its interpretation of the contract provision must be right because only three customers have moved to reject rate proposals since *Mobile* and because Mobile Gas Service Corporation itself has not challenged United's right to file for changes in rates under its standard form of service agreement.

Respondents have neither the time nor the resources to ascertain the precise number of direct customers that have filed motions to

Had United so regarded the provision it would not have proposed the inclusion of the provision ultimately

dismiss or reject rate filings on the authority of the *Mobile* and *Memphis* cases in various Commission rate proceedings, but the information respondents do have discloses that unilateral rate proposals have been challenged by a larger number of direct customers than the Commission represents. Motions to reject have been filed by six customers of El Paso Natural Gas Co. at Docket No. G-12948 (19 F.P.C. 154, 155); by six direct customers of Colorado Interstate Gas Co. at Docket No. G-13541; by fifteen direct customers of Northern Natural Gas Company at Docket No. G-12153; and by six customers of Pacific Northwest Pipeline Corporation at Docket No. G-13202. In addition, numerous motions to reject have also been filed by state and governmental authorities and by indirect customers, as is conceded by the Commission (FPC Br., p. 111, notes 62 and 62a; p. 112, note 63; see also El Paso Natural Gas Co., 19 FPC 154, 155. In the Pacific Northwest proceedings alone (Docket No. G-13202) motions have been filed by at least eleven indirect customers.

Additionally, many reasons may account for a buyer's failure up to this time to raise the question. There may be affiliation between the pipeline company and the distributor, as in the Columbia Gas System. There may be reluctance to antagonize the sole supplier of one's only product, particularly when the issue is already being decided by the courts.

As for Mobile Gas' position, the Commission has apparently overlooked the fact that on April 13, 1956, Mobile in the proceedings in this case before the Commission filed what the Commission described (R. 227) as "tantamount to a motion to reject United's increased rates as to it." Mobile said (T. 2645): "By virtue of Article V of said Service Agreement between Mobile and United, said parties have agreed to pay only whatever rate is made lawfully effective in the manner required under the Natural Gas Act to effect a change in a contract rate." Then citing this Court's decision in *Mobile* and quoting therefrom, Mobile stated further (T. 2646): "Since there has been no mutual agreement between Mobile and United for the change of the rates mentioned in Article V of said Service Agreement, any efforts by United to change them prior to a hearing by the Federal Power Commission and a determination by said Commission are void."

deleted in a contract that already contained the "effective superseding" language.

The Commission suggests, (FPC Br., pp. 109-110), that United deleted the provision because it deemed that it had already reserved the right to file unilaterally by virtue of the "effective superseding" provision. The Commission argues that this is the only reasonable explanation for United's action since it argued in 1948, when the regulations were adopted, that Section 4(d) did not authorize unilateral changes of contract rates and that agreement on new rates was required. (FPC Br. pp. 109-110) The Commission's premise is mistaken. United in 1952, when it filed its tariff, shared the Commission's pre-Mobile view of section 4(d). In deleting the provision, United stated that it was only putting its customers on notice of its rights under the Act (*supra*, p. 59). And in this case United has asserted that prior to Mobile it (R. 186)—

*"was generally considered and accepted, United included, that rates provided in a contract were subject to change by a filing under Section 4(d). United's belief and conviction that such was a correct interpretation of the Act was well known."*

In short, United conceived the deleted provision as not necessary because it believed that *the Act* gave it the requisite authority. Therefore, "to avoid additional delay in placing its rate schedules on file" (FPC Br., p. 109) that might be involved in securing Commission approval of a "rewording of the provision" (R. 290) which United thought the Commission might nevertheless require before permitting its inclusion in the form of service agreement, United dropped the provision altogether.

Thus, the contentions of the petitioners with respect to the interpretation of the contract provision are completely inconsistent with the contemporaneous evidence of the intent of the author of the provision.

3. If construed as an agreement on a rate-changing procedure the contract provision would not satisfy explicit requirements of the Commission's rules.

For still another reason it is difficult to understand the Commission's adoption of an interpretation of the service agreements as reserving to United the power to file any change upon any grounds it saw fit. The Commission's own regulations require that, when a seller desires to reserve the right to increase its rates, the service agreements must provide that "it is or will be its (seller's) privilege, under *certain specified conditions*, to propose to the Commission a modification, change, or substitution of the then effective rate." (Section 154.38(d)(3), FPC Br., Appendix A. p. 125).

In *Houston Texas Gas and Oil Corp., et al*, 17 FPC 303, 305, the pipeline attempted to reserve in its service agreements a right to propose changes, without specifying the conditions under which the changes could be made. The Commission rejected this form of service agreement, saying:

"In the form of service agreement no conditions for the filing of changes are set forth, while Sections 154.38(d)(3) of the Commission's regulations requires that the service agreement set forth the 'specified conditions' under which a change may be filed. Accordingly, the present language of the form of service agreement is not allowable and revised tariff sheets should be filed enumerating the conditions, if any, under which rate changes may be proposed.

United's service agreements do not even remotely specify any conditions whatsoever under which it will have the privilege to propose changes.<sup>34</sup>

4. The practical consequences which the interpretation adopted by the Commission would impose on purchasers of industrial use gas makes the interpretation unreasonable and contrary to the policy of the Natural Gas Act.

The need for stability of supply arrangements, which are essential to the health of the natural gas industry, because of the heavy investments pipeline company, distributor and consumer must make, argues strongly against a reading of the provision as authorizing United to change by unilateral action its rate contracts whenever its interests so dictate, particularly contracts for sale for industrial use which are not subject to suspension and refund (350 U.S. at 344):

(i) Mississippi buys substantial volumes of gas from United for resale for industrial use (R. 61). As to these purchases, the Commission has held that the suspension and refund provisions do not apply because of the proviso of Section 4(e) which states (FPC Br., Appendix A, p. 119):

"That the Commission shall not have authority to suspend the rate, charge, classifications, or service

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<sup>34</sup> The Commission seeks to avoid this by the argument (FPC Br., p. 75, note 48a) that the reference to "certain specified conditions" in Section 154.38(d)(3) of the regulations is a reference only to procedural requirements, i.e., the giving of notice under Section 4(d) and the supplying of data and information to support the proposed change. This argument is rejected by the Commission's own holding. *Houston Texas case, supra.*

for the sale of natural gas for resale for industrial use only."<sup>35</sup>

This means that under the petitioners' interpretation of the "effective superseding rate schedules" provision, regardless of how exorbitant United's notion of a reasonable rate may be,<sup>36</sup> during the entire pend-

<sup>35</sup> See Commission order issued December 7, 1953, in *Mobile Gas Service Corp.*, 12 FPC 1422, where the Commission said (at page 1424):

"Mobile also requests in its petition \* \* \* that rates collected by United (for sales for resale for industrial use only) \* \* \* be collected subject to refund. But, clearly, the power to require refunds under Section 4(e) of the act applies only to rates which are subject to suspension and which have been suspended. An interpretation permitting refunds of that part of the sales for resale for industrial use only found not to be justified would nullify the proviso against suspension of these rates, obviously a course of action which the Commission cannot take."

The Court will recognize that this December 7 order was the one that denied Mobile's motion for rejection of the filing and was involved in the *Mobile* case.

<sup>36</sup> Almost invariably, rate increases proposed by natural gas companies under the Natural Gas Act have proved to be excessive by substantial amounts. In 1952, the Commission observed: "In most cases it has been found after investigation and hearing that the requested increases were justified only in part and in some few instances not at all." (Thirty-second Annual Report of the Federal Power Commission (1952), at page 95). In that year reported figures showed that of the natural gas rate increase applications disposed of, about 50% of the proposed increases or over \$30,000,000 was disallowed as not justified (*ibid.*, at page 97). In 1953 the disallowed amounts in concluded cases represented 16% or over \$11,000,000 (Thirty-third Annual Report of the Federal Power Commission (1953), at page 101). In 1956 the disallowances represented 40% or almost \$10,000,000 and in 1957, 17% or about \$9,000,000 (Thirty-seventh Annual Report of the Federal Power Commission (1957), at page 82).

ency of the rate proceedings, which may remain dormant or pending for two years or more, Mississippi, without any prospect of refund through Commission action, must pay the rate United has unilaterally chosen to impose.<sup>37</sup>

When the final order of the Commission is issued, it may have only prospective effect as to rates for industrial use gas. So, if the rate is reduced, under the interpretation urged by the petitioners, United, in its unfettered discretion, can raise it simply by filing a new proposal. Consequently, as soon as the distribution company gets relief—prospectively—under petitioners' interpretation of the contracts, it can be immediately confronted again with another unilateral increase in rates, which becomes effective within 30 days after filing, no matter how excessive. Cf. *Mississippi River Fuel Corp. v. Federal Power Commission*, 202 F. 2d 899, 902. In the instant case, United has not waited for the conclusion of the first proceeding at Docket No. G-9547, out of which these review proceedings arise. Since filing the unilateral proposals to increase its rates in Docket No. G-9547, United has filed three additional proposals, each of which included a proposed increase in the rates for sales for resale for industrial use—each time to a yet higher level.<sup>38</sup>

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<sup>37</sup> Mississippi has been required to pay higher and higher industrial resale rates since November 1, 1955 under those conditions (*infra*, note 38).

<sup>38</sup> The latest rate increase proposal was filed May 29, 1958 at Docket No. G-15360. The proposed new rates for industrial use gas were allowed to go into effect by the Commission on July 1, 1958 in accordance with its practice. *United Gas Pipe Line Company*, Docket No. G-15360, Order issued June 27, 1958. This proposed increase superseded a proposed increase at Docket No.

It is inconceivable, therefore, that Mississippi, or any other distribution customer, would voluntarily enter upon a contract with United which would deliberately make effective any rates for industrial use gas that United chose to charge. United has, of course, in the past filed proposed increases in rates in whatever amounts and at whatever times it chose, including proposed industrial increases which were not subject to refund at Commission order no matter how excessive they were eventually found to be. But this situation prevailed only because of the Commission's pre-Mobile construction of Section 4(d) as providing a rate-changing procedure which was initiated merely by unilaterally-filed rate proposals. Mississippi never intended to, and did not, agree to make effective what could not be effective without its consent (R. 193, 282).

The significance of the situation with respect to industrial gas rates is not altered by the Commission's assertion that presently only seven of the 80 largest pipeline companies make non-suspendible sales for industrial resale use averaging "only 6.1% of the total dollar volume of their jurisdictional business" in 1956

G-12801 which the Commission allowed to become effective on July 1, 1957. *United Gas Pipe Line Co.*, 19 FPC 119. United's proposal in Docket No. G-12801 superseded the proposed increase in Docket No. G-10592 in effect since November 16, 1956, which, in turn, superseded the proposed increases in rates in the instant case which were in effect since November 1, 1955. Proposed increases in other rates were first suspended by the Commission in each of these dockets and were subsequently, at different dates, permitted to become effective, subject to refund, in Docket No. G-9547 on April 1, 1956; in Docket No. G-10592 on November 16, 1956; and in Docket No. G-12801 on December 1, 1957. *United Gas Pipe Line Company*, Docket No. G-15360, Order issued June 27, 1958, p. 2. In short, United has since 1952, unilaterally filed four general rate increase proposals.

and that United's nonsuspendible jurisdictional sales in 1956 average 2.92% of its total jurisdictional business (FPC Br. 81-82).

These percentages may be entirely accurate (respondents do not know), but it is not these percentage relationships that disclose the importance of industrial sales. It is the percentage relationships of a distribution company's industrial business to its total business that counts. Thus, in this case, Mississippi's sales for industrial use represented 64.9% of the total volume purchased by Mississippi from United for resale and 43.7% of its revenue derived from the resale of gas purchased from United.<sup>30</sup>

The fact is, of course, that sales by a distribution company of gas for industrial use reduce the average cost of gas to residential consumers, who use gas for space-heating, cooking and water-heating. If it were not for industrial use sales, the cost of gas for domestic use would be out of reach of the domestic consumer. Without the industrial outlet, a distribution company would be forced to charge higher rates to its residential customers. This is because the residential customers' utilization of the facilities provided to meet their needs on the coldest day of the year is obviously much higher than throughout most of the year when gas for space-heating is reduced or discontinued.

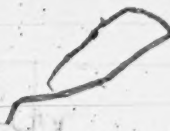
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<sup>30</sup> Willmut Gas and Oil Company, another customer of United, advised the court of appeals that 45% of its annual volume of sales represent sales for resale for industrial use only. *Brief of Willmut Gas and Oil Company*, C.A.D.C., No. 13683, p. 12, in *Willmut Gas and Oil Co. v. Federal Power Commission*, 251 F. 2d 381. The *Willmut* case, involving review of the same Commission order, was decided by the court below on the authority of its decision in this case.

Yet they would have to pay the fixed charges incurred by the company in providing facilities for their benefit. This would mean a very high cost for each cubic foot of gas used by the residential consumers since the cost of service is spread over a smaller number of units. However, the industrial customers, with their high loads all year long, are in a position to utilize the capacity that would otherwise be idle and a burden to the residential consumers. The result is that the fixed charges that would otherwise fall on the residential consumers are levied on and assumed by the industrial customers. Increasing cost of gas for industrial use that may cause loss of such industrial outlets is, consequently, of grave concern to the distribution company.

In recognition of the benefits derived by residential consumers from a utility's industrial sales, regulatory commissions, with court approval, have blocked competition that would deprive a utility of its industrial load. *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, (Mich. Sup. Ct.) 328 Mich. 650, 44 N.W. 2d 324, 330, affirmed 341 U.S. 329, 334, 71 S. Ct. 777, 780.

The interdependence between industrial sales and residential service was also recognized by the Illinois Supreme Court in *Produce Terminal Corp. v. Illinois Commerce Commission*, 414 Ill. 582, 112 N.E. 2d 141. The decision in that case recognized that if the utility were to lose its industrial market, its rates to its residential customers would have to be increased substantially. And the United States Court of Appeals for the District of Columbia Circuit affirmed an order of the Federal Power Commission which recognized



the importance of the industrial-type load in benefiting all customers by increasing the load factor and thus decreasing and stabilizing the unit cost of gas. *Charleston & Western Carolina Ry. Co. v. Federal Power Commission*, 234 F. 2d 62, 63.

This importance of the industrial sales to the distributor probably explains why the Commission has repeatedly recognized the inequity of the prohibition against suspension of rates for industrial resales and has recommended that it be removed from the Act in each of its annual reports to Congress since 1951, and for some years prior thereto in its justification for appropriations" (FPC Br., p. 82).

(ii) The conflict between a reading of the "effective superseding rate schedules" provision as authorizing unilateral rate changes and the necessity for stability of supply arrangements, particularly as to industrial users, is strikingly exemplified by the situation in the Pacific Northwest. The company operating in that area is Pacific Northwest Pipeline Corporation, which was authorized to construct and operate an interstate natural gas pipeline in June, 1954. *Pacific Northwest Pipeline Corporation*, Docket No. G-1429, Opinion No. 271, issued June 18, 1954. In connection with the promotion of that project, distribution companies were organized and industrial companies were induced to enter into contracts with the distributors for the use of natural gas in place of oil in reliance on representations as to lower costs and economies to be realized through the use of gas at the rates specified in their contracts, which they were led to believe would remain stable for some years. *Petition for Intervention of Coos Bay Pulp Corporation, et al., in Pacific Northwest Pipeline*

Corporation, Docket No. G-13202, pp. 2, 5, 7, 8, 9, 10, 11.<sup>40</sup> The conversion to natural gas involved a substantial investment by each industrial company, aggregating more than \$1,700,000,<sup>41</sup> and in at least one instance, involved cancellation of a favorable long-term oil contract. *Ib.*, p. 5.

Pacific Northwest Pipeline Corporation began operations in April, 1957. Within five months thereafter, without even a full year's operating experience, in August, 1957, Pacific Northwest chose to file unilateral rate increase proposals to its distributors,<sup>42</sup> under Section 4(d) of the Act, which were suspended for five months, except as to the rates for resale for in-

<sup>40</sup> The industrial companies included Coos Bay Pulp Corporation, Crown Zellerbach Corporation, Hooker Electrochemical Company, Longview Fibre Company, Pacific Northwest Alloys, Inc., Pennsalt Chemicals Corporation, Puget Sound Pulp and Timber Co., Scott Paper Company, Seattle Steam Corporation and Weyerhaeuser Timber Company. See *Petition for Intervention of these companies*, dated June 12, 1958, in *Pacific Northwest Pipeline Corporation*, Docket No. G-13202.

<sup>41</sup> Coos Bay Pulp Corporation expended \$9,500 to convert; Crown Zellerbach, \$515,000; Hooker Electrochemical over \$93,000; Longview Fibre over \$60,000; Pacific Northwest Alloys, \$94,653; Pennsalt Chemicals, \$134,380; Puget Sound Pulp and Timber, \$297,318; Scott Paper, \$123,500; Seattle Steam, \$16,859; and Weyerhaeuser Timber, \$171,000. *Ibid.*, pp. 3, 4, 5, 6, 7, 8, 9, 10.

<sup>42</sup> To Coos Bay Pulp, \$9,100 a year; to Crown Zellerbach, approximately \$255,000 annually; to Hooker Electrochemical, about \$58,000 annually; to Longview Fibre, approximately \$200,000 per year; to Pacific Northwest Alloys, about \$15,000 annually; to Pennsalt Chemicals, \$64,110 per year; to Puget Sound Pulp and Timber, about \$78,000 annually; to Scott Paper, about \$190,000 per year; to Seattle Steam about \$34,036 annually; and to Weyerhaeuser Timber, about \$102,000 annually. *Petition for Intervention of Coos Bay Pulp Corporation, et al.*, in Docket No. G-13202, pp. 3, 4, 5, 6, 7, 8, 9, 10.

dustrial use only. *Pacific Northwest Pipeline Corporation*, Docket No. G-13202, order issued September 4, 1957. The proposed increases for industrial sales, over \$1,000,000 annually, which the industrial companies must absorb under their contracts with the distributors without recourse, have been in effect since September, 1957. *Ibid*; *Petition for Intervention of Coos Bay Pulp Corporation, et al.*, Docket No. G-13202, pp. 2, 11. No hearings have yet been held by the Commission and no action has been taken by the Commission on the industrial companies' joint petition to intervene and motion to reject the rate proposals on the authority of *Mobile* and the decision of the court below. In sum, after being induced to make substantial investments to convert to the use of gas on representation of savings in fuel costs and stability of the supply arrangement, by the unilateral abrogation of the contract rate by the pipeline company, the industries are forced to incur higher costs, with no power of suspension and refund in the Commission. This seriously impairs the ability of these industries to compete in the markets of the world for the sale of their products. These consequences which flow from unilateral disruption of the purchase and sale agreement underscore this Court's analysis in the *Mobile* case and show clearly that the purchasers' consent to unilateral rate changes is not lightly to be implied, and cannot reasonably be implied.

4. The Commission's erroneous legal interpretation of the contract provision cannot be sustained under the "substantial evidence" rule.

Finally, we note petitioners' contention (FPC Br., p. 101; United Br., p. 49; Texas Gas Br., p. 11) that the Commission's interpretation of the "effective

superseding rate schedules" provision "is reasonable and supported by substantial evidence" and should, therefore, "be accepted here." The provision of Section 19(b) of the Act that the Commission's findings "as to the facts, if supported by substantial evidence, shall be conclusive" has no application here, however. The interpretation of the contract involves a pure legal issue for independent judicial determination. *United Corporation v. Securities and Exchange Commission*, 219 F. 2d 859, 861. The interpretation of the pertinent provisions of the contracts here involved do not require any expert and specialized knowledge, contrary to the Commission contention (FPC Br., p. 101).

Moreover, even if the section were applicable, the Commission's interpretation is not supported by substantial evidence and cannot be sustained on the record, as respondents have demonstrated. Administrative Procedure Act, Section 10(e), 5 U.S.C.A. Sec. 1009(e).

Respondents submit, therefore, for each and all of the foregoing reasons, that the "effective superseding rate schedules" provision was not intended to lend, and may not be interpreted as lending, effectiveness to rate proposals which would otherwise be of no effect. No customer would voluntarily give such unlimited power to its supplier. The provision was only recognition of the Commission's superior power to alter the rates without disturbing the contractual obligation on the one side to sell at the price fixed by the Commission in the lawful and valid exercise of its powers, and on the other side to buy the specified volumes at that price.

## II.

**THE DECISION BELOW PRESERVES THE STABILITY OF  
SUPPLY ARRANGEMENTS AND PROTECTION OF  
CONSUMER RIGHTS ESSENTIAL TO A HEALTHY  
DEVELOPMENT OF THE NATURAL GAS INDUSTRY.**

In an effort to secure review of the decision below, petitioners, without documentation or substantiation, made sweeping and unrestrained allegations respecting the effect of the decision below, predicting destruction of the regulatory scheme (United Pet., pp. 11, 12, 16; Texas Gas Pet., pp. 4-5, 6), administrative burdens (F.P.C. Pet., p. 13; Texas Gas Pet., pp. 7-8), financial disaster, economic chaos, confusion and futility, and impracticable rate procedures (F.P.C. Pet., pp. 29-30; United Pet., pp. 10, 11; Texas Gas Pet., pp. 6-7, 8, 9).<sup>43</sup>

<sup>43</sup> The same claims were made in the *Mobile* case, first as reasons for granting the writ and thereafter as grounds for reversal of the lower court. In its petition and brief in *Mobile*, United urged (Pet. Oct. Term, 1955, No. 17, pp. 8, 9, 10; Main Brief, *ibid.*, pp. 15, 47) that the decision of the Court of Appeals for the Third Circuit was "sweeping", "disrupting" and "destructive" of the regulatory scheme, imposed "intolerable", "overwhelming" and "impossible" burdens on the Commission, and "produces utter chaos and confusion in its (the Acts) administration". The Commission, for its part, in its petition in *Mobile* alleged that "regulation in the public interest of rates for natural gas and electricity, would be retarded" (p. 23); that the decision would "increase the administrative load of the already overburdened Commission"; and would "result in even more delay in Commission action on rate increases needed by gas companies to offset constantly rising costs" (p. 24).

The predictions of calamity raised by petitioners in this case are also reminiscent of the dire, but never realized, predictions that were made by pipeline companies, producers and the Commission following the decisions of the D. C. Circuit in the *Phillips* case (*State of Wisconsin v. Phillips Petroleum Co.*, 205 F. 2d 706, affirmed *sub nom*, *Phillips Petroleum Co. v. State of Wisconsin*, 347 U.S. 672) subjecting producers' interstate rates and sales of

Following the granting of the writs on February 3, 1958, on the basis of the same, but still undocumented, predictions of disaster, the Solicitor General moved to advance the cause for argument, but the motion was denied. *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, Oct. Term 1957, Nos. 691, 694 and 695, Order entered March 3, 1958. The resulting passage of time having confirmed respondents' "documented assertions in their brief in opposition that the decision below will not have the "harmful consequences' baldly asserted by the Solicitor General" and echoed by the other petitioners and *amici curiae*", (Resp. Opp., p. 25) and certiorari having been granted, the Commission's present speculations as to the adverse effects and hardships, which will allegedly result from an affirmance of the decision below, are now significantly restrained. But even these claims remain equally unfounded, undocumented and unsubstantiated. The absence of documentation is particularly significant in view of a form letter sent far and wide on December 30, 1957, by the Commission in an effort to find support

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natural gas to Commission jurisdiction, and in the *Panhandle* case (*City of Detroit v. Federal Power Commission*, 230 F. 2d 810, certiorari denied, 352 U. S. 829), rejecting field price as a basis for rate-making.

<sup>44</sup> In their opposition, respondents demonstrated that the Solicitor General's allegations were contradicted by contemporaneous statements by the Commission's Chairman to the New York Society of Security Analysts (pp. 19-20, 22); by a contemporaneous statement of one of the largest pipeline companies to its stockholders (p. 20); by negotiated agreements for rate increases after the *Memphis* decision (p. 21); and by facts and figures which the Solicitor General's allegations did not take into account (pp. 23-25). Respondents showed also that the Solicitor General's assertion that unilateral rate proposal filings are "fair and just to the consumer of natural gas" is not borne out by the facts (Resp. Opp., pp. 25-28).

for the allegedly disastrous effect on the gas industry and the national economy which it had said in its petition for certiorari would result from the decision of the court below.<sup>45</sup>

The Commission describes at length the growth of the natural gas pipeline industry (FPC Br., pp. 64-71), attributes it to the unilateral rate-change procedure (FPC Br., pp. 71-77), and argues that continued growth of the pipeline industry requires restoration of the unilateral rate-change procedure through reversal of the decision below. The claim is also advanced that the ability of pipeline companies to borrow capital funds for expansion will be impaired unless the unilateral rate-change procedure is restored (FPC Br., p. 93). The Commission disparages (FPC Br., pp. 93-99) Section 5(a) as providing a satisfactory avenue for relief, because the new rates may have only prospective effect and because of the time allegedly required to complete a proceeding under Section 5(a). Agreement on new rates through negotiations is similarly disparaged as an unsatisfactory avenue of relief (FPC Br., pp. 89-93).

On the other hand, the Commission contends that consumers through expanded service have benefited from the unilateral rate-change procedure while securing, at the same time, protection of their interests against excessive prices (FPC Br., pp. 55, 78, 80, 81-83); that the unilateral rate-change procedure does

<sup>45</sup> Mississippi Valley Gas Company is on the Commission's mailing list and therefore received the letter which is printed as Appendix B to this brief. The Commission assiduously limited the request for information to *adverse* effects. It asked for data as to "cancellation or deferment" plans. It did not ask for data as to new expansion plans.

not debilitate Section 5(a) as two members of the court below feared (FPC Br., pp. 55-62); and that the tariff-service agreement system is needed to control undue preferences and discrimination (FPC Br., p. 21).

Of course, these arguments, even if they were meritorious, would have no place in the disposition of the issues in this case. The merits and demerits of one rate-change procedure as against another—the adverse consequences of one and benefits of the other—the wisdom of one method as against another—are not for the courts and do not reach the questions presented. These arguments are for Congress—to be resolved in that forum. *Saturn Oil & Gas Company v. Federal Power Commission*, 250 F. 2d 61, 68, 69, *certiorari denied*, 78 S. Ct. 542; *Cf. Mississippi River Fuel Corp. v. Federal Power Commission*, 202 F. 2d 899, *certiorari dismissed*, 345 U.S. 988. Since the arguments have been made, however, Respondents now show they are without merit.

1. Considering first the Commission's contention that the decision below will throttle continued expansion of the natural gas industry, we note that the contention rests on the premise that the growth of the pipeline companies resulted from the unilateral rate-change procedure. There is, however, no basis for attributing the growth of the pipeline companies to the unilateral rate-change procedure. The growth of the natural gas pipeline companies described by the Commission is paralleled by the growth of the market for gas supplied by the distribution companies. Indeed, it must be obvious that if the gas distribution markets were not there to absorb the gas supplied by the pipelines, there would have been no growth in the pipeline branch of the gas

industry—in fact, no natural gas industry to speak of. This absence of relationship is confirmed by the fact that distribution companies operating in states where rate increases are secured prospectively only after they have been justified in a hearing<sup>46</sup> have experienced the same growth.<sup>47</sup>

<sup>46</sup> Respondents in their brief in opposition (p. 23) to the petitions for writs of certiorari named nine States (Arizona, California, Idaho, Kansas, Michigan, Montana, Ohio, South Dakota, and Wisconsin) and Hawaii in which rate increases may be effective only prospectively and after investigation and hearing. The Commission asserts (FPC Br., p. 94, note 57) that "examination of the pertinent statutes and judicial decisions of the states cited by respondents shows that the situation in most of these states is, in reality, contrary to that asserted by respondents". The Commission's claim is difficult to understand in view of the fact that in its main brief in the *Mobile* case (Oct. Term, 1955, No. 31, pp. 14, 69) the Commission named Hawaii and all but Idaho of the states enumerated by respondents as having statutes requiring Commission approval of the increases in rates before they may be made effective. The *Report of the Rate Committee*, American Gas Association, 1956-1957, Table V, page 28, utilized by the Commission (FPC Br., p. 96, note), names each of the enumerated states (except Montana and South Dakota) as requiring a hearing before the increase can be effectuated and lists 11 others (District of Columbia, Florida, Georgia, Louisiana, Massachusetts, North Carolina, Oklahoma, Tennessee, Utah, Washington and West Virginia).

<sup>47</sup> The comparisons are as follows: The Commission states that the increase in annual natural gas sales to ultimate consumers from 1938 to 1948 was about 2½ times the 1938 figure (FPC Br., p. 68). For eight of the nine states named by respondents the same ratio prevailed (Gas Facts, *American Gas Association* (1948), Table 79, p. 112; Gas Facts, *American Gas Association* (1948), Table 76, p. 109). For electric utilities the ratio was 2.6 times (FPC, *Electric Statistics* (1938), p. 3; FPC, *Sales of Electric Energy to Ultimate Consumers* (1945-1949), Sec. 5, S17 Series). The Commission next describes the percentage increases in sales from 1949 to 1955 for residential as over 100%, for commercial as 83%, for industrial as 100%, and 104% for the United States (FPC Br., p. 69). The comparable statistics for the eight states are 99% for

\*The experience of the pipeline industry since the *Memphis* decision decisively contradicts the implication that expansion will be throttled and financing by pipeline companies will be impaired by the *Memphis* decision. Transcontinental Gas Pipe Line Corporation has secured Commission authorization, by an application filed since the *Memphis* decision, for the largest expansion program in its history, involving an outlay of \$167,000,000. *Transcontinental Gas Pipe Line Corporation*, Docket No. G-13143, *et al.*, Opinion No. 315, issued September 4, 1958; *Wall Street Journal*, September 5, 1958, p. 6. In June, 1958, the Commission authorized an \$81,840,000 expansion program by *Natural Gas Pipe Line Company of America*. Order issued June 20, 1958, Docket No. G-12399; *Wall Street Journal*, June 24, 1958. On March 26, 1958, the Commission authorized *El Paso Natural Gas Company* to undertake a \$138,500,000 expansion program. Dockets No. G-11797 and G-12580; *Wall Street Journal*, March 28, 1958. In Docket No. G-13246, *Michigan Wisconsin Pipe Line Company* was authorized to embark on a \$19,453,000 expansion program. Order issued June 23, 1958. In Docket No. G-13647 on June 30, 1958, *Gulf*

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residential, 61% for commercial (with 6 of the states showing over 100%); 95% for industrial; and 96% for all 8 states (Gas Facts, *American Gas Association* (1949), Table 77, p. 107; Gas Facts, *American Gas Association* (1956), Table 87, p. 100). For electric utilities, the comparable statistics on a nationwide basis are, respectively, 97%, 77%, 109% and 71% (FPC, *Electric Power Statistics*, Sec. 5). With regard to continued growth as shown by 1956 figures over 1955 figures (FPC Br., p. 69), the Commission's 12%, 11% and 10% for residential, commercial and industrial, respectively, compares to 9%, 9% and 11% for the 8 states and 12%, 9% and 11% for electric utilities (Gas Facts, *American Gas Association* (1957), Table 88, p. 101; FPC, *Electric Power Statistics*, Section 5).

*Interstate Gas Company* was authorized to go forward with an expansion program totalling \$51,000,000. *Southern Natural Gas Company* on April 21, 1958, in Docket No. G-13082, *et al*, received authorization to begin a \$39,767,800 expansion program, and in July, 1958, Texas Gas Transmission Corporation filed an application for a \$20,000,000 expansion program.<sup>48</sup> And on September 10, 1958, the president of Tennessee Gas Transmission Company, noting that gross revenues and net income for 1958 were running ahead of the record 1957, told *The Wall Street Journal* (September 15, 1958, p. 23): "I don't see how we can fail to continue the same trend of growth that we have had in the past, assuming money is available at a fair rate and recognition of actual money costs by rate regulating agencies."

Refutation of the claim advanced by the Commission is also found in the report by "Gas", an industry magazine (April, 1958, issue, pp. 58-59, 62-63, 70-71), on its 11th annual survey of the gas industry's construction program.<sup>49</sup> It captioned its report thus, "GAS INDUSTRY WILL CONTINUE ITS TREMENDOUS GROWTH IN 1958" (*ibid*, p. 58). "Gas" reported that the "now-famous Memphis decision is apparently having little effect on the 1958 expansion plans of the gas industry, with one exception", the

<sup>48</sup> These are the larger applications and authorizations for expansion programs. The brief would be unduly extended by the enumeration of the many programs filed and authorized, involving sums ranging from \$1,000,000 to \$5,000,000.

<sup>49</sup> 216 distribution, transmission, and integrated gas companies, representing nearly 85 percent of the connected meters and more than 95 percent of the total pipeline miles in the United States, reported total construction budgets for 1958 of \$2,045,449,000 for new construction. ("Gas", April, 1958, p. 58).

postponement of a \$182,000,000 expansion program planned jointly by Natural Gas Pipe Line Company of America, Colorado Interstate Gas Company and Pacific Northwest Pipeline Corporation.<sup>50</sup> "Other than this one project", "Gas" related (p. 58), "distribution, transmission and integrated companies say they are going ahead with their current plans." "All replies", "Gas" continued (p. 58), "were received at least two months after the Memphis decision was handed down"; responding companies therefore having "had ample time to weigh the decision, and make their plans for 1958 accordingly."<sup>51</sup>

Statistics released by the Commission confirm the continued growth and expansion of the interstate natural gas pipeline companies in gas plant investment

<sup>50</sup> Announcement of the cancellation of the project was made in August, 1958. Although abandonment was, only in part, attributed by a company official to the *Memphis* decision, we respectfully suggest that the staff's opposition to the project (Brief of Commission Staff Counsel in Docket No. G-9966, pp. 32-33; Exceptions of Staff Counsel to Decision of Presiding Examiner, Docket No. G-9966) and a recent court set-back (*Midwestern Gas Transmission Company, et al v. F.P.C., et al.*, — F. 2d —, CADC, No. 13954, decided May 13, 1958), which enmeshed the project in procedural difficulties and augured delay, were the facts that brought about cancellation of the supply contract by Colorado Interstate, and forced abandonment of the project. In the *Matter of Natural Gas Pipe Line Co.*, Docket No. G-9966, Presiding Examiner's Decision, issued August 15, 1958.

<sup>51</sup> This is also confirmed by a forecast of the American Gas Association reported in *The New York Times* of September 7, 1958, Section 3, pp. 1, 11. Referring to the decision of the court of appeals in this case and the failure of Congress to enact legislation exempting natural gas producers from Commission regulation, the article stated that "expansion programs still are moving forward, and the industry sees no reason to slow down."

and gas operating revenues.<sup>52</sup> Net utility plant at the end of July, 1958, aggregated \$6,063,729,347 as compared to \$5,549,863,401 at the end of July, 1957, an increase of 9.3 percent. *FPC Release No. 10038*, September 16, 1958, p. 1. Utility operating income for the 12 months ended July, 1958, amounted to \$398,157,814, higher by 14.2 percent than the \$348,586,768 earned in the 12 months ended July, 1957. *Ibid.* Net income for the same period showed an increase of 11.6 percent from \$243,526,606 to \$271,845,092. *Ibid.* Gas sales to other utilities, the principal business of the pipelines increased 9.2 percent.<sup>53</sup>

2. The story is the same with respect to the reception of interstate natural gas pipeline bond and stock offers since the *Memphis* decision. In August, 1958, Consolidated Natural Gas Company sold \$45,000,000 of debentures which were "snapped up quickly by institutional investors". *Wall Street Journal*, August 14, 1958. In the afternoon of the offering day, the issue was "oversubscribed and the books closed." *Ibid.* The cost to the gas company of 4.365 percent was "significantly lower than the 4.92%" it paid on September 17, 1957, before the *Memphis* decision, for the sale of \$30,000,000 of "comparable" 25-year debentures. *Ibid.*

On February 4, 1958, Tennessee Gas Transmission Company offered 1,000,000 shares of common stock

<sup>52</sup> The Commission reports that the statistics are based on operations of 41 natural gas companies engaged in the transportation or sale for resale of natural gas in interstate commerce. *FPC Release No. 10038*, September 16, 1958, p. 2.

<sup>53</sup> Commenting on similar data for the 12 months ended June, 1958, *The Oil and Gas Journal*, August 25, 1958, p. 55, said: "While other industries were faced with cutbacks, the natural gas industry forged ahead during the 12 months ending June."

having a value of \$30,750,000. It was an "early sell-out". The issue was quickly "oversubscribed and the books closed." *Wall Street Journal*, February 4, 1958; *ibid*, February 6, 1958. In March, 1958 a \$25,000,000 issue of corporate bonds of Texas Eastern Transmission Corporation "went well at retail" although this was at a time of "a hesitant market that is somewhat more liberally supplied with undistributed corporate bonds." *Wall Street Journal*, March 24, 1958. Also, in March, 1958, a \$30,000,000 debenture issue of Columbia Gas System to finance a construction program was a fast seller. Offered on March 7, 1958, the "subscription books were announced as closed" on March 9, 1958. The cost to the Columbia Gas System of  $4\frac{3}{8}$  percent was better than the 5 percent cost incurred before the *Memphis* decision. *Wall Street Journal*, February 7, 1958 and March 10, 1958. On September 10, 1958, Texas Eastern successfully floated a \$35,000,000 issue of first mortgage bonds. Early in the day of offering the "books had been closed" and at the close of the day the issue was "selling at a premium over the prices at which the issue had come into the market early in the day." *Wall Street Journal*, September 11, 1958, p. 17.

Generally, the stocks of natural gas pipeline companies were up by 15.8 percent in March, 1958 over the 1957 low point in December, exceeding even the increase of distribution company stocks which were up only 12.5 percent. *Gas Age*, March 6, 1958, p. 54; *The Oil and Gas Journal*, Newsletter, March 24, 1958.

The facts regarding the favorable reception accorded natural gas security issues and the excellent position of natural gas stock prices generally, leave no room for the unfounded assertion that the *Memphis* decision

impairs the pipeline's ability to raise capital and on favorable terms.

3. So, too, experience since the *Memphis* decision contradicts the Commission's insistence that rate increases cannot be obtained through negotiations by pipeline companies with their customers (FPC Br., pp. 89-92). That experience has shown that justifiable rate increases, subject to Commission review under Section 4(d) and (e), are obtainable through negotiations by the pipeline companies with their customers even when as many as 93 customer companies are concerned.<sup>54</sup> Rate increase agreements were successfully negotiated by Transcontinental Gas Pipe Line Corporation with 30 of its principal customers (*Wall Street Journal*, April 16, 1958), by Southern Natural Gas Company with 93 of its customers (*Southern Natural Gas Company*, Docket No. G-13258, Order issued April 18, 1958), by Texas Gas Transmission Corporation with 64 of its customers, including respondents (FPC Release No. 9643, January 20, 1958), and by Natural Gas Pipe Line Company and Texas Illinois Natural Gas Pipeline Company, with their respective customers (*Wall Street Journal*, June 24, 1958; *Natural Gas Pipe Line Company of America*, Docket No. G-13950, Order issued May 21, 1958; *Texas Illinois*

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<sup>54</sup> Typically a relatively few agreements for the purchase and sale of natural gas accounted for most of the gas sold for resale and revenues received. Thus, the annual reports of United, Texas Gas and Southern to the Commission for 1957 (FPC Form No. 2) disclose that 7 of United's customers account for almost 87% of its sales for resale and revenues; 6 of Texas Gas' customers account for about 80% of its sales for resale and revenues; and 6 of Southern's customers account for about 87% of its sales for resales and revenues.

*Natural Gas Pipeline Company*, Docket No. G-13951, Order issued May 21, 1958).

Indeed, through negotiated agreements pipeline companies, since the *Memphis* case, have been able to secure increases in rates more quickly and clean up their rate problems which they had not been able to do for years. *The New York Times*, April 27, 1958, Section 3, p. 1, quoting William B. Poor, Vice President of Ford, Bacon & Davis, Inc., an engineering and consulting firm closely associated with the natural gas industry.

Aside from this evidence of agreement through negotiation on rate increases, it is difficult to understand the claim that the pipeline companies and their customers cannot agree on rates through negotiation. Individually negotiated agreements were the rule up to 1938, prior to the enactment of the Natural Gas Act. Individual contracts, although standardized in many respects, are the basis for all transactions, and the rate schedules are not, as the Commission argues (FPC Br., p. 5) all of general applicability (e.g., R. 59). Nothing in the Commission's rules deprives the buyer and seller of the right to negotiate and to make contracts tailored to individual requirements.<sup>55</sup> The rules

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<sup>55</sup> Thus, when United first converted its contracts to tariff-service agreements to comply with the rules, where the contracts continued as the executed service agreement, United in tariff form set up a rate schedule covering the sale under the contract, which specified the buyer to which the schedule was applicable, the character of service involved and the rate, as required by the rules (R. 6-7). This did not alter the fact that the sale was made under contract at a contract rate. Order No. 144 simply made it easier to locate and know the rate. The same situation prevailed as to United's Rate Schedule G-3J which was available only to

require only that the agreements be filed in a specified form and in some cases the rules even grant exemption from these requirements (Section 154.52, FPC Br., Appendix A, p. 125).<sup>56</sup> As long as the Act's prohibitions against undue preference and discrimination are not violated, buyer and seller are free to negotiate their arrangements and file them in prescribed form.

Beyond that, individually negotiated agreements on new rates need not depart from standardized forms of agreements nor destroy the tariff-service agreement form. The agreements on new rates that have been negotiated since the *Memphis* decision have all been accomplished within the framework of the tariff-service agreement form. Also, the rates agreed to have been uniform for the same class of service.

Individually negotiated agreements between interstate electric utilities and their customers are the rule under the Federal Power Act, where the Commission has not installed the tariff-service agreement form and has not required the adoption of a standard form of contract. Individually negotiated agreements, over 30,000 in number, are on file with the Commission as rate schedules between producers of natural gas and

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Mississippi Valley Gas Company (R. 8-9); as to Rate Schedule IND-1J, which was available only to Mississippi Valley for the purchase from United of natural gas for use only in the Rex Brown Power Plant of Mississippi Power and Light Company (R. 10-11); and as to Rate Schedule IND-2J which was available only to Mississippi Valley for the purchase of natural gas from United for resale only to certain specified industrial customers of Mississippi Valley (R. 12-13). These latter sales are now made under the simplified, standard form of agreement; nothing else has changed.

<sup>56</sup> The Commission itself has said that the regulations do not restrict the freedom of contract (note 26 *supra*, p. 43).

their customers. *FPC Release No. 10029*, dated September 11, 1958.

The Commission concedes (F.P.C. Br. 86) that individually negotiated contracts, through various types of escalation clauses, could provide "the needed rate flexibility" but argues that "it would make it extremely difficult for the Commission to discharge" its responsibility under Section 4(b) of the Act which enjoins gas companies subject to the Act from making and granting undue preferences and maintaining unreasonable differences in rates between localities or classes of service.<sup>57</sup> This is also difficult to understand since only individually negotiated agreements are employed by interstate electric utilities under the Federal Power Act. The fact is, of course, that no reason exists why there cannot be uniformity in rates for the same class of service even under individually negotiated agreements and no undue preferences or discrimination. Prior to the adoption of the regulations governing form, the problem was locating the rate to make comparisons. *FPC Brief in C.A.D.C., No. 10125*, pp. 42-43, *United Gas Pipe Line Company v. Federal Power Commission*, 181 F. 2d 796.

If, as the Commission speculates, individually negotiated agreements might result in undue preferences and undue discrimination, the function of the Commission is to eliminate the evil. The Commission does not deny this, but appears to plead that the performance of its function imposes hardships upon it. That the performance of its responsibilities may be incon-

<sup>57</sup> This, in effect, was urged by United in the *Mobile* case as a reason for reversing the Third Circuit. *United Gas Pipe Line Company*, Oct. Term, 1955, No. 17, Main Brief, pp. 47-49.

venient or burdensome provides no reason for disregarding the Act and the terms of the contracts. As this Court said in *Mobile* (350 U.S. at 344):

“\* \* \* the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest.”

Arguing for the unilateral right to change contract rates for pipeline companies, United and the Commission in *Mobile* urged that a Section 5(a) proceeding, to which the pipeline companies would be remitted for relief, was an unsatisfactory rate relief procedure because there would be an even greater delay in Commission action on rate increases needed by gas companies to offset constantly rising costs, because the burden of an already overburdened Commission would be increased and because pipeline companies could not invoke Section 5(a). (Main Brief of the Federal Power Commission, Oct. Term 1955, No. 31, pp. 9, 23, 88-89; FPC Pet. for Cert., Oct. Term 1955, No. 31, pp. 23-24; United Pet. for Cert., Oct. Term, 1955, No. 17, p. 9; Main Brief of United in No. 17, Oct. Term 1955, p. 47).

This Court said, however, (350 U.S. at 344-345):

“It may be noted also that this interpretation, while precluding natural gas companies from unilaterally changing their contracts simply because it is in their private interests to do so, does not deprive them of an avenue of relief when their interests coincide with the public interest. Section 5(a) authorizes the Commission to investigate rates not only ‘upon complaint of any State, municipality, State commission, or gas distribution company’ but also ‘upon its own motion.’ Thus, while natural gas companies are understandably not

given the same explicit standing to complain of their own contracts as are those who represent the public interest or those who might be discriminated against, there is nothing to prevent them from furnishing to the Commission any relevant information and requesting it to initiate an investigation on its own motion. And, if the Commission, after hearing, determines the contract rate to be so low as to conflict with the public interest, it may under § 5(a) authorize the natural gas company to file a schedule increasing the rate."

Despite this Court's holding that Section 5(a) provides "an avenue of relief", the Commission, still arguing for the unilateral right of pipeline companies to abrogate their contracts, continues to urge that Section 5(a) is an unsatisfactory rate relief procedure (FPC Br., pp. 97, 98).

To buttress its claim that a Section 5(a) proceeding is an unsatisfactory rate relief procedure, the Commission represents that Section 5(a) proceedings have required considerable time to complete (FPC Br., pp. 96-97).

The 5(a) proceedings to which the Commission refers, without specific identification, were proceedings to determine whether existing rates are excessive and should be reduced.<sup>58</sup> The experience of the Commission in Section 5(a) proceedings looking to reduce the profits of the pipeline company provides no satisfactory criterion for judging the efficacy of Section 5(a) procedures in rate increase cases. Rather, re-

<sup>58</sup> They could not have been otherwise because until the *Mobile* decision "Section 5(a) was regarded and used primarily, if not exclusively, as a vehicle for reducing, rather than increasing, rates." (FPC Br., p. 104)

spondents submit, Chairman Kuykendall's statement to the New York Society of Security Analysts is a more accurate appraisal of the situation:

"\* \* \* I suspect that we may find that a rate case under section 5 can be processed in much shorter time than was ever thought possible. We know that in such a case, the pipeline company would supply all the data that our staff would request, as soon as it possibly could. When the customer companies realize that additional supplies of needed gas cannot be forthcoming until the pipeline company is first granted reasonable rates, it would seem that they would likewise cooperate to bring the case to a speedy conclusion."<sup>59</sup>

In the question and answer period following the address, Chairman Kuykendall reiterated that "[w]e might be surprised as to how quickly we could operate" under Section 5 in a rate increase case. "[O]ne thing that would speed it up", he observed, "is that the pipeline companies would be willing parties." "They would be moving instead of running away." "They might be hoping for a rate increase and would be very cooperative. \* \* \*". (*Wall Street Journal*, January 6, 1958.)

The Commission's concern for the plight of *pipelines* whose rate relief may be delayed by necessity of Section 5(a) proceedings seems inconsistent with its attitude toward rate relief for *consumers*. As the

<sup>59</sup> Indeed, the customers of Transcontinental Gas Pipe Line Corporation have agreed to increased rates needed by Transco to expand its facilities to supply the increased demands of the customers. Southern Natural Gas Company has also secured agreement of its customers to increased rates in connection with an expansion program to supply increased demands of its customers.

independent gas producer contracts continue to flood the Commission with even higher prices for natural gas, the Commission becomes increasingly reluctant to condition its certificates of public convenience and necessity for the new sales upon the producer's agreement to a reasonable rate level. *Continental Oil Company, et al*, Docket No. G-11024, 17 FPC 880; *Anthony J. Tamborello, et al*, Docket No. G-3045, Opinion No. 287, issued November 28, 1955, mimeo. ed. pp. 5-6; *Seaboard Oil Company*, 19 FPC 416, 420-421 (March 31, 1958); *Transcontinental Gas Pipe Line Corporation, et al*, Docket Nos. G-13143, et al, Opinion No. 315, issued September 4, 1958.

To the contention that the skyrocketing producer prices are unfair to the consumer, the Commission answers that the consumer has an adequate remedy by way of Section 5(a) proceedings (*Continental Oil Company, supra*, 17 FPC at p. 881; *Tamborello, supra*, mimeo ed., pp. 5-6), which entail a full Commission investigation of the *reasonableness of the new rates*. Since a rate reduction under Section 5(a) may have only prospective effect, the consumer must pay without recourse any excessive rates collected during the period of the investigation. If this provides sufficient rate relief for consumers (under a statute passed primarily for their protection against exploitation by the pipeline companies, *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 611), then it should be no less adequate rate relief for the pipeline companies.

There is nothing inherently unfair in putting unilateral rate increase proceedings upon the same procedural basis as unilateral rate decrease proceedings.

Pipeline suppliers, distributors and consumers are then under the same rules; the need for an adjustment of rates—upward or downward—must first be established by proof as the Act intended, before relief is obtained, unless, in either case, there is mutual agreement upon the new rate.

Thus, the decision below would not “probably lead to grave inequities and spawn serious injuries” as the Commission asserts. On the other hand, contrary to the Commission’s speculation (FPC Br., pp. 20-21, 55, 80), the position for which the Commission contends does not protect the interests of consumers and their distribution companies. A brief review of several factors will quickly disclose this.

1. The facts as to sales for resale of natural gas for industrial use alone (*supra*, pp. 63-71) flatly contradict the contention that a system of unilateral rate filings fully protects the distributor and consumer. The Act (Section 4(e)) prohibits the suspension of rates for the sale for resale of gas for industrial use. Under the pre-*Mobile* procedure, therefore, a proposed unilateral increase in rates for industrial-use gas became effective thirty days after filing, and thereafter the purchaser was forced to pay the higher rate without any authority in the Commission to require refunds, (*supra*, pp. 63-64).

2. Even where the Commission does have the power of refund, refunds do not, as the Commission assumes, protect the interest of consumers and distribution companies. Refunds do not restore to the distribution companies residential space-heating and industrial customers, and associated revenues, irretrievably lost to competitive fuels during the period

that the excessive rates were being collected under bond. Subsequent investigation resulting in ultimate establishment of rates at just and reasonable levels and refund of the difference cannot undo this damage.

The Commission's present claim that the refund procedure of Section 4(e) protects "all interests" (FPC Br., p. 21), is also contradicted by its Annual Report to Congress in 1953 (p. 101) in which the Commission described the procedure of collecting the "higher rates under bond" as "unsatisfactory; burdensome and present(ing) many difficult problems for the (pipeline) company as well as for the distribution utilities which must pay the higher rates."<sup>60</sup> The "problem of distributing impounded funds to consumers in the event that the proposed rate increases are denied even in part" was described as "time-consuming and expensive." (*Ibid.*, p. 101). In March, 1953, the Rate Committee of the American Gas Association issued a report confirming the "many serious, special problems for gas distribution companies" stemming from the collection of rate increases under bond, and the lack of protection afforded by the power of refunds. (*Problems of Gas Distributing Companies Arising From Natural Gas Rate Increases Becoming Effective in Accordance with Section 4(e) of the Natural Gas Act*, p. 3, et seq.).

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<sup>60</sup> The Commission seeks to explain away this inconsistency (FPC Br., p. 84) by asserting that its statement does not mean that it was expressing a preference for another procedure, such as Section 5(a) proceedings. This, however, does not resolve the conflict nor detract from or deny the accuracy of its comments regarding the unilateral rate-change procedure.

The unilateral abrogation of contractual supply arrangements, more often than not based on "speculative estimates of future costs" and attempted "changes in regulatory principles and methods which have long been established" (*Annual Report of the Federal Power Commission* (1953) p. 102), with pyramiding of one unilateral rate change upon another, has been the bane of existence of the distributor and consumer. For protracted periods of time the actual cost of gas purchased by the distributor, which usually represents more than 60 percent of the distribution company's total operating expenses and may be three or four times as great as its total operating income, is uncertain.

3. The unilateral abrogation of contractual supply arrangements usually unjustified in substantial degree (*supra*, p. 64, note 36; FPC Br., p. 80; note 52a), has become a device to require the distributors and consumers to provide funds to the pipeline companies for capital additions and working capital and without adequate compensation to them for such loans. The 6 percent interest required to be paid on refund is actually an effective interest rate of 3 percent *after* taxes. The incentive to use the unilateral rate change proposal for this purpose is thus apparent. Funds in the money market, particularly equity funds, are not available at that cost.

4. Under the pre-*Mobile* practices of the Commission, the pipelines, despite their long-term rate contracts with their customers, have been allowed by unilateral rate filings promptly to shift the incidence of increases in gas costs to their customers. This has destroyed the incentive of pipeline companies to keep

down the cost of gas purchased from producers, for they have relatively little stake in the outcome of the bargaining.<sup>61</sup> These factors, coupled with the tremendous competition among pipelines for new gas reserves, have caused the current field price of gas to soar out of all proportion to the general economic trend.<sup>62</sup>

The Commission argues that this situation no longer presents a problem, since producer rates are now subject to regulation by the Commission (FPC Br., p. 83). Unfortunately, however, as Commissioner Connole has pointed out, "the effort (has been) so far unsuccessful \* \* \* to devise an approach to rate regulation for independent producers \* \* \*". The "delay and indecision" of the Commission has, in Commissioner Connole's opinion, given "thrust \* \* \* to the skyrocketing producer prices."<sup>63</sup>

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<sup>61</sup> In *Associated Oil and Gas Co.*, 17 FPC 199, the Presiding Examiner, with Commission approval (17 FPC 223), said (17 FPC 220):

"It is believed that Trunkline would not have been so easily persuaded that the advantages of the proposal justified the increase in the cost of its operation were it not for the fact that in such situations the added costs fall not upon the pipeline but actually upon the pipeline's customers."

<sup>62</sup> Commissioner Connole, dissenting in *Transcontinental Gas Pipe Line Corporation*, — FPC — (Opinion No. 315, issued September 4, 1958), referred to the "skyrocketing producer prices" and to the fact that "prices in south Louisiana are now fifty or one hundred percent higher than prevailed only a few short years ago!" "This rise in the general price level," said the Commissioner, "has been brought about almost entirely by initial contracts for new gas. \* \* \*" (mimeo. ed., pp. 2, 3).

<sup>63</sup> Id., mimeo. ed., p. 2.

5. Finally, the attack by the Commission upon the separate statement of Judges Washington and Bazelon in the opinion below (R. 271, note 3), shows a complete misunderstanding of what was there said. The two Judges pointed out that a prerequisite to a rate change under Section 5(a) was evidentiary proof that the *existing* rates were "unjust, unreasonable, unduly discriminatory or preferential", while under Section 4 the only proof required was that the *new* rate was not unlawful.

Therefore a rate increase under the Section 5(a) procedure requires proof of both facts—unreasonableness of the existing rate and reasonableness of the new one. Obviously this is a more stringent requirement than that of proof of the reasonableness of the new rate alone.

The Commission denies that conclusion, asserting that there can be only one reasonable rate—the "zone of reasonableness" is a "pin point" (FPC Br., p. 60)—and therefore to prove that the new rate is reasonable *ipso facto* proves the unreasonableness of the existing rate.

The difficulty is that the Commission's assertion is erroneous as a matter of law. This Court has held that "(s)tatutory reasonableness is an abstract quality *represented by an area rather than a pin point*. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high." *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251. Also, Section 5(a) provides that "\* \* \* the Commission may order a decrease where existing rates \* \* \* are not the *lowest* reasonable rates." Where the

statute speaks of reasonableness as covering an area, the Commission may not reduce the statutory concept to a pin point.

It is no answer to say that the rate settled upon by the Commission in a rate proceeding is a pin-point. That merely proves that it is one rate which is within the zone of reasonableness. The Commission could not, as a matter of law, say in all cases that every other rate was outside that zone, and unreasonable.

It is thus clear that if unilateral contract rate changes are permitted under Section 4(d), substantial protection for consumers provided in Section 5(a) would be unlawfully circumvented.

\* \* \* \* \*

In the foregoing argument it has been demonstrated that the judgment of the court below was required by the decision of this Court in the *Mobile* case and by the express terms and basic policy of the Natural Gas Act. Affirmance of the judgment below will serve to carry out the basic philosophy of the Act—the preservation of contracts to permit the stability of supply arrangements “which all agree is essential to the health of the natural gas industry.” *Mobile*, 350 U.S. at 344-345.

**CONCLUSION**

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

**REUBEN GOLDBERG**

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**Washington 5, D. C.**

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Memphis Light, Gas and  
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pany*

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of Memphis, Tennessee*

**October, 1958**

**APPENDIX A****TEXAS GAS TRANSMISSION CORPORATION****FPC Gas Tariff****Second Revised Volume No. 1****Original Sheet No. 104****FORM OF SERVICE AGREEMENT****ARTICLE III*****Delivery Pressure***

The gas to be delivered hereunder shall be delivered to Buyer.

**ARTICLE IV*****Prices and Rate Schedules***

1. Buyer agrees to pay Seller for all natural gas delivered hereunder at Seller's legally effective rate applicable to the type of service and at the point or points of delivery specified herein. Seller's present legally effective rate for said service is contained in Seller's Rate Schedule . . . , as filed with the Federal Power Commission, which rate schedule together with the General Terms and Conditions applicable thereto are by reference made a part of this agreement.

2. Seller may file with the Federal Power Commission, or other body having jurisdiction, for a change in the rates and charges effective as to Buyer; provided, however, that should it become unnecessary so to file, Seller shall have the right to increase the rates and charges effective as to Buyer to provide that Buyer shall reimburse Seller on account of any additional tax, as hereinafter set forth.

Any sales, transactions, occupation, service, production, severance, gathering, transmission, export or excise tax, assessment or fee, or taxes of a similar nature or equivalent in effect (not including income, excess profits, capital stock, franchise or general property taxes) which may be hereafter levied, assessed or fixed by the United States or any State or other governmental or taxing authority in respect of or applicable to any natural gas transmitted by Seller which are in addition to or greater than those, if any, which would be levied, assessed or fixed at the date of this contract, in respect of or applicable to such natural gas and which Seller may be liable for during any month, either directly or indirectly through any obligation to reimburse others, are

Issued by: W. M. Elmer, Vice President

Issued on: July 15, 1953

Effective: September 1, 1953

## TEXAS GAS TRANSMISSION CORPORATION

## FPC Gas Tariff

Second Revised Volume No. 1

Original Sheet No. 105

## FORM OF SERVICE AGREEMENT

## ARTICLE IV

*Prices and Rate Schedules  
(Continued)*

hereinafter collectively referred to as an "additional tax". Buyer shall reimburse Seller on account of such additional tax by paying to Seller an amount determined by multiplying seven-eighths of the total additional tax by a fraction, the numerator of which shall be the amount of natural gas sold and delivered by Seller to Buyer during such month and the denominator of which shall be the total sales by Seller during such month.

## ARTICLE V

*Term of Contract*

1. This contract shall be effective .....

This contract shall continue in full force and effect for a period of .....  
and shall thereafter continue in full force and effect unless or until terminated either by Seller or Buyer upon twelve (12) months' prior written notice to the other specifying a termination date at the end of such period of ..... or at the end of any yearly period thereafter.

Issued by: W. M. Elmer, Vice President

Issued on: July 15, 1953

Effective: September 1, 1953

**APPENDIX B**

**FEDERAL POWER COMMISSION**  
**Washington 25**

**December 30, 1957**

**Mississippi Valley Gas Co.**  
**Deposit Guaranty Bank Bldg.,**  
**Jackson, Mississippi**  
**A 5628-23**

**Att: Secretary**

**Gentlemen:**

The Commission requests your cooperation in obtaining data needed in connection with the attempt to secure a reversal of *Memphis Light, Gas and Water Division v. F.P.C.* (CADC, No 13666, decided November 21, 1957).

If certiorari is granted on the petition which the Solicitor General is expected to file by the year's end, obtaining a date for argument before the summer recess (and consequently any possibility of decision by then or much before 1959) depends on getting the Court to take the highly unusual step of advancing the case on its calendar.

As part of our effort to accomplish this, we expect to show the actual impact of the decision of the Court of Appeals on the national economy. For this purpose we must have the basic data described in the attached list by January 20. Time is of the essence.

It is mandatory that your actual situation be represented with complete accuracy in every particular. There must be a solid basis for every statement of fact made. To this end it is requested that all data submitted be reviewed and certified to be correct by a responsible officer.

**Very truly yours,**

**J. H. GUTRIDE**  
**Secretary**

**Attachment**

**DATA SHOWING IMPACT OF MEMPHIS DECISION****As of January 1, 1958**

- (1) Pipeline expenditures (dollars) for extension or expansion of service during 1956 and 1957 and proposed for 1958 and 1959.
- (2) Changes (cancellation or deferment) since November 21, 1957, in:
  - (a) contemplated security issues (dollar amount and type);
  - (b) plans for purchase of materials, supplies and equipment for new or expanded construction (orders or options—by miles and size of pipe, tonnages and units of major equipment such as compressor units, dehydrators, etc. If this can be amplified to discuss the effect on manufacturers of equipment, wrapping and coating materials, and other elements, please do so);
  - (c) plans for gas procurement as related both to commitments with respect to maintenance of present deliverability and to expansion of present markets or service of new markets;
  - (d) plans for certificate applications (Federal, State or municipal); and
  - (e) number of communities, direct customers, and ultimate retail customers affected by any changes in plans reflected in (a) through (d), by items.
- (3) Do you anticipate any further changes between January 1, 1958 and June 30, 1958? Any significant changes occurring during the month of January should immediately be reported by telegram to supplement the data submitted.



SUPREME COURT, U. S.

Office Supreme Court, U.S.

FILED

OCT 1 1958

JAMES R. BROWNING, Clerk

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1958

Nos. 23, 25 and 26

UNITED GAS PIPE LINE COMPANY, ET AL., *Petitioners*

v.

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET. AL.

On Writs of Certiorari to the United States Court of Appeals  
for the District of Columbia Circuit

**ANSWER OF MEMPHIS LIGHT, GAS AND WATER  
DIVISION, THE CITY OF MEMPHIS, TENNES-  
SEE, AND MISSISSIPPI VALLEY GAS COM-  
PANY IN OPPOSITION TO MOTIONS FOR  
LEAVE TO FILE BRIEFS AMICI CURIAE IN  
SUPPORT OF PETITIONERS**

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*Attorney for Respondents Memphis  
Light, Gas and Water Division and  
the City of Memphis, Tennessee*

October, 1958

IN THE  
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PANY IN OPPOSITION TO MOTIONS FOR  
LEAVE TO FILE BRIEFS AMICI CURIAE IN  
SUPPORT OF PETITIONERS**

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED  
STATES AND THE ASSOCIATE JUSTICES OF THE SU-  
PREME COURT OF THE UNITED STATES:

Memphis Light, Gas and Water Division, the City  
of Memphis, Tennessee, and Mississippi Valley Gas  
Company, Respondents in the above-captioned causes,  
oppose the motions of Ameré Gas Utilities, et al., of  
Natural Gas Pipeline Company of America, et al., and  
of Long Island Lighting Company for leave to file  
briefs *amici curiae* in support of the Petitioners.

In support of their opposition, Respondents respectfully show the Court the following:

1. Amere Gas Utilities, et al., are members of the Columbia Gas System. When these companies unsuccessfully sought leave to file a brief *amici curiae* in support of the petitions for writs of certiorari, Respondents in their answer to the motion of the Columbia Gas System companies said (Answer, pp. 2-3):

“Contrary to the allegations of the Columbia Gas System movants \* \* \* they are not in a position to present objectively the relationship of the decision below to purchasers of natural gas, for the Columbia Gas System as producer, transporter, seller and distributor of natural gas is confronted by sharp conflicts of interest that exist between these various activities. As a consequence, any presentation made by the Columbia Gas System as to the purchasers’ position on the issues presented cannot be detached and objective, for, of necessity, the Columbia Gas System is forced to take positions that accommodate all of its interests.  
\* \* \*”

In their present motion, the Columbia Gas System companies concede that “Respondents correctly have stated the several ways in which Columbia Companies participate in natural gas operations, and *have described accurately the perspective which derives from such participation*” (Amere Motion, p. 2).

2. Additionally, the Columbia Gas System companies seek to inject questions that are not presented and their brief is addressed in the main to such questions. Thus, the Columbia Gas System companies allege that there is presented the question of a natural gas company’s power under Section 4(d) of the Nat-

ural Gas Act to establish rates *ex parte* to prospective customers (Motion, pp. 3-4). No such question, however, is presented. This is evident from the statements of the questions presented as set forth in the briefs of the Petitioners (FPC Br., p. 2; United Br., pp. 2-3; Texas Gas Br., p. 2). We are not concerned in these proceedings with the rights of a natural gas company vis-a-vis its *prospective* customers, but rather with its rights under rate contracts with *existing* customers.

3. To the extent that the brief of the Columbia Gas System companies and the briefs of Natural Gas Pipeline Company of America, et al., and Long Island Lighting Company are addressed to the questions presented, they make no contributions of facts or of legal discussion that have not been presented and adequately briefed in the 229 pages of briefs filed by the Petitioners. The briefs of the Columbia Gas System companies, of Natural Gas Pipeline Company of America, et al., and of Long Island Lighting Company simply reiterate, in their own particular form and choice of words and phrases, the same arguments made by the Petitioners, and in some instances on the basis of extra-record, unidentified hearsay. Thus, Natural Gas Pipeline Company of America, et al., attempt to mount an argument on the basis of extra-record "correspondence with local counsel, state commissions, etc." (Natural Br., p. 24). This does not "contribute to the Court's consideration of the issues on this appeal" (Natural Motion, p. 2), nor does mere repetition, particularly of undocumented allegations regarding the impact of the decision below which are refuted by the experience of the industry, including some of the movants, since the decision of the court below (Resp. Br., pp. 78-84).

4. The participation of the movants is not required to bring before this Court any facts or legal arguments that are material to the disposition of the issues. The parties to the proceeding represent every phase of the natural gas industry and the consumer interest and are well able to present to the Court the pertinent economic and business facts affecting the industry, consumers, investors and the general public to the extent that such facts are germane to the disposition of the issues and to present and brief the legal arguments.

WHEREFORE, Respondents oppose the motions for leave to file brief *amici curiae*.

Respectfully submitted,

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October, 1958

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MOTION FILED

JAN. 2 1958

IN THE

JOHN T. PEY, Clerk

**Supreme Court of the United States**

OCTOBER TERM, 1957

Nos. ~~23~~ ~~6948~~ ~~695~~ 254-26

FEDERAL POWER COMMISSION, UNITED GAS  
PIPE LINE COMPANY, TEXAS GAS TRANS-  
MISSION CORPORATION, AND SOUTHERN  
NATURAL GAS COMPANY,

*Petitioners,*

v.

MEMPHIS LIGHT, GAS AND WATER DIVISION,  
CITY OF MEMPHIS, TENNESSEE, AND MIS-  
SISSIPPI VALLEY GAS COMPANY,

*Respondents.*

**ON PETITIONS FOR WRITS OF CERTIORARI TO  
THE COURT OF APPEALS FOR THE DISTRICT OF  
COLUMBIA CIRCUIT**

**MOTION OF THE OHIO FUEL GAS COMPANY, UNITED  
FUEL GAS COMPANY, THE MANUFACTURERS LIGHT AND  
HEAT COMPANY, ATLANTIC SEABOARD CORPORATION,  
KENTUCKY GAS TRANSMISSION CORPORATION, CENTRAL  
KENTUCKY NATURAL GAS COMPANY, VIRGINIA GAS  
DISTRIBUTION COMPANY, AMERE GAS UTILITIES COM-  
PANY, HOME GAS COMPANY, COLUMBIA GAS OF NEW  
YORK, INC. AND CUMBERLAND AND ALLEGHENY GAS  
COMPANY FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN  
SUPPORT OF PETITIONS.**

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January 2, 1958

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1957

FEDERAL POWER COMMISSION, UNITED GAS  
PIPE LINE COMPANY, TEXAS GAS TRANS-  
MISSION CORPORATION, AND SOUTHERN  
NATURAL GAS COMPANY,

*Petitioners,*

*v.*

MEMPHIS LIGHT, GAS AND WATER DIVI-  
SION, CITY OF MEMPHIS, TENNESSEE,  
AND MISSISSIPPI VALLEY GAS COMPANY,

*Respondents.*

Nos.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE***

*To the Honorable the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

The Ohio Fuel Gas Company, United Fuel Gas Com-  
pany, The Manufacturers Light and Heat Company,  
Atlantic Seaboard Corporation, Kentucky Gas Transmission  
Corporation, Central Kentucky Natural Gas Company, Vir-  
ginia Gas Distribution Company, Amere Gas Utilities Com-  
pany, Home Gas Company, Columbia Gas of New York,  
Inc. and Cumberland and Allegheny Gas Company, herein-  
after referred to collectively as the Columbia Companies,  
respectfully move the Court for leave to file the attached  
brief *amici* in support of the above captioned petitions for  
writs of certiorari to the United States Court of Appeals for

the District of Columbia Circuit filed by the Solicitor General of the United States on behalf of the Federal Power Commission, United Gas Pipe Line Company, Texas Gas Transmission Corporation and Southern Natural Gas Company. Consent to the filing of that brief by the Columbia Companies was denied by two of the parties to this cause, Memphis Light Gas and Water Division and the City of Memphis, Tennessee.

The position of the Columbia Companies differs from those of the corporate petitioners and from those of the various pipeline companies which have moved this Court for leave to file a brief *amici curiae* in support of these petitions (all engaged primarily in the business of transporting and selling natural gas at wholesale) in that the Columbia Companies occupy three positions in the natural gas industry, as follows:

- (1) certain Columbia Companies are large purchasers of natural gas from interstate pipeline companies under tariffs filed with the Federal Power Commission and pursuant to service agreements entered into under those tariffs;

- (2) certain Columbia Companies are large retail distributors of natural gas to the consuming public under rates determined by the provisions of state laws in the various states in which they serve; and

- (3) certain Columbia Companies also sell gas at wholesale for ultimate distribution by non-affiliated retail distribution companies under tariffs filed with the Federal Power Commission and pursuant to service agreements entered into under those tariffs.

The decision which the Petitioners seek to have this Court review has an importance to purchasers of natural gas, as well as to sellers. The Columbia Companies are

in positions in which they will experience the incidence of the decision of the Court of Appeals below in all its aspects. Accordingly, those positions will enable them to make available to this Court in its consideration of the captioned petitions for writs of certiorari aspects of its damaging effects upon the operations of the natural gas industry on the levels of purchasing at wholesale, of transporting and selling at wholesale and of distributing and selling at retail. It is submitted that the attached brief of the Columbia Companies presents views on the certiorari question before the Court which neither the petitioners nor the other parties moving for leave to file a brief *amici* will be able to present.

Respectfully submitted,

BRUCE BROMLEY  
EDWARD S. PINNEY  
Attorneys for Movants

# BRIEF AMICI CURIAE IN SUPPORT OF PETITIONS

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1957

FEDERAL POWER COMMISSION, UNITED GAS  
PIPE LINE COMPANY, TEXAS GAS TRANS-  
MISSION CORPORATION, AND SOUTHERN  
NATURAL GAS COMPANY,

*Petitioners,*

*v.*

MEMPHIS LIGHT, GAS AND WATER DIVI-  
SION, CITY OF MEMPHIS, TENNESSEE,  
AND MISSISSIPPI VALLEY GAS COMPANY,

*Respondents.*

Nos.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF OF THE OHIO FUEL GAS COMPANY, UNITED  
FUEL GAS COMPANY, THE MANUFACTURERS LIGHT AND  
HEAT COMPANY, ATLANTIC SEABOARD CORPORATION,  
KENTUCKY GAS TRANSMISSION CORPORATION, CENTRAL  
KENTUCKY NATURAL GAS COMPANY, VIRGINIA GAS  
DISTRIBUTION COMPANY, AMERE GAS UTILITIES COM-  
PANY, HOME GAS COMPANY, COLUMBIA GAS OF NEW  
YORK, INC. AND CUMBERLAND AND ALLEGHENY GAS  
COMPANY *AMICI CURIAE* IN SUPPORT OF PETITIONS.**

The corporations above named, as *amici curiae* (herein-  
after called the Columbia Companies), are filing this brief  
in support of the granting of the petitions for writs of  
certiorari to the United States Court of Appeals for the Dis-  
trict of Columbia Circuit filed by the Solicitor General of  
the United States on behalf of the Federal Power Commis-  
sion, United Gas Pipeline Company, Texas Gas Trans-  
mission Corporation and Southern Natural Gas Company.

## QUESTIONS PRESENTED

The Columbia Companies agree that there is presented the question set forth in the captioned Petition on behalf of the Federal Power Commission.\* In addition, the Columbia Companies submit that the following question is also presented:

Does the Natural Gas Act\*\* preclude a Purchaser from obtaining a long-term supply of natural gas by agreeing with a natural gas company that the price shall be that set forth in Seller's rate schedule then on file with the Commission and shall be subject to change by the Seller's *ex parte* filing of superseding rates, the Purchaser however to retain the right to oppose such rates in proceedings before the Commission, and the rates to be subject to suspension, investigation and ultimate determination by the Commission pursuant to the provisions of Section 4 of the Natural Gas Act?

## INTEREST OF THE COLUMBIA COMPANIES

This Court in the *Mobile*† case stated and the natural gas industry has assumed that the rate making powers of natural gas companies under the Act were to be no different from those they would possess in the absence of the Act: “. . . to establish *ex parte*, and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement the rate agreed upon with a particular customer.” The decision below seems to deny jurisdiction to the Commission to act upon a rate established by the *ex parte* method.

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\*Hereinafter referred to as the Commission.

\*\*52 Stat. 821, as amended, 15 U. S. C. §§ 717-717W (1952), as amended, 15 U. S. C. A. § 717(c) (Supp. 1957); hereinafter referred to as the Act.

†*United Gas Pipe Line Company v. Mobile Gas Service Corporation*, 350 U. S. 332, 343 (1956).

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The Columbia Companies comprise an integrated system which produces, purchases, transports, stores and distributes, at wholesale and retail, natural gas.\* The population served by the system is over 12,500,000; 1,335,000 domestic and 2,300 industrial customers are served at retail and 1,700,000 customers are served by the system's wholesale customers. Thus a total of over 3,000,000 customers depend upon the system for gas service. The investment in the Columbia Companies, held principally by citizens of the United States, amounts to over \$700 million, of which about \$400 million consists of debt securities owned principally by insurance companies, pension and welfare funds and the balance of about \$300 million is the equity interest held by over 135,000 stockholders.

**(i) Columbia Companies as Purchasers of Natural Gas**

Columbia Companies purchase or have contracts for the purchase of natural gas from all major pipelines serving the Northeastern part of the United States.\*\* During the year 1957, they will purchase from such pipelines an estimated 558,454,000,000 cubic feet. Present service arrangements provide a long term supply on a firm basis for a maximum of 1,623,200,000 cubic feet per day. The Southwest gas supply so purchased constitutes approximately 80% of the total gas supply of the Columbia Companies. In 1957, such gas will cost approximately \$178,000,000, an amount equal to approximately 47% of the total revenues of the Columbia Companies.

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\*Four Columbia Companies sell gas at retail; three at wholesale; the others at both retail and wholesale.

\*\*They are Tennessee Gas Transmission Company, Texas Eastern Transmission Corporation, Texas Gas Transmission Corporation, Panhandle Eastern Pipeline Company, Transcontinental Gas Pipeline Corporation and Gulf Interstate Gas Company.

In entering into service agreements for such gas supplies, Columbia Companies have, in accordance with industry practice, intended that their suppliers could file *ex parte* from time to time changes in their rate schedules; however they have not consented, prior to the filing of such rate schedules, to the level of rates contained therein and have reserved and exercised where necessary their rights to oppose such changes in rate schedules during the investigations held pursuant to Section 4(e).

In order to meet increasing requirements of existing market areas, Columbia Companies have under contract with pipeline suppliers an additional supply of approximately 235,000,000 cubic feet per day to be made available at varying times during 1958. Such additional volumes are necessary to meet an indicated increased requirement of 350,000,000 cubic feet on the peak day of the 1958-59 winter. Substantial construction is required by the pipelines to supply such additional volumes and that construction requires the raising of large sums of capital by the sale of securities to the public.

#### **(ii) Columbia Companies as Distributors at Retail**

Columbia Companies distribute natural gas at retail direct to the consuming public in Ohio, Pennsylvania, New York, West Virginia, Kentucky, Virginia and Maryland. Approximately 60% of the total gas is sold at retail and 70% of the total revenues of the system are obtained from that retail business. Such sales are made at rates regulated in all instances by either state regulatory commissions or by municipal authorities.

There is a continuing increase in the demand for natural gas service in all areas served at retail by the Columbia Companies. In order to meet those increasing requirements, it is necessary that substantial additional volumes of gas be procured from the Southwest.

### **(iii) Columbia Companies as Distributors at Wholesale**

Columbia Companies sell to 94 customers at wholesale under rates subject to the jurisdiction of the Commission. The principal market areas served at wholesale are the greater metropolitan areas of Cincinnati, and Dayton, Ohio, Washington, D. C., Baltimore, Maryland, and Richmond, Virginia. Such wholesale sales constitute about 40% of the total gas sold by, and 30% of the total revenues of, the system. Those sales at wholesale are made pursuant to tariffs on file with the Commission which tariffs include rate schedules, general terms and conditions and forms of service agreement. The form of service agreement with respect to the rates at which natural gas is offered for sale by the Columbia Companies subject to Commission jurisdiction has provisions similar to those in the service agreement of United Gas Pipe Line Company involved in this proceeding.

From time to time it is necessary for Columbia Companies to adjust their rates to their wholesale customers to reflect, among other things, increases in the cost of gas purchased from their pipeline suppliers.

Most wholesale customers of the Columbia Companies have indicated increasing requirements of natural gas for the immediate future and to meet those requirements the system must construct additional facilities and obtain additional gas from the Southwest.

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From the foregoing, it is apparent that, because of their unique position as large purchasers and distributors of natural gas, Columbia Companies have a vital interest in (a) the orderly and practical manner of fixing the prices which they are to pay for gas offered for sale by their pipeline suppliers and which they are to collect for gas offered for sale to their wholesale customers and (b) the protection of the financial integrity of their pipeline suppliers so that

they can finance economically the construction urgently needed to supply the increasing requirements of the public served by the Columbia Companies.

## ARGUMENT

The Columbia Companies will rely upon the Petitions<sup>o</sup> of the Commission and the corporate petitioners and the brief of the other *amici* to demonstrate to this Court that the decision below (i) incorrectly construes the Act to limit the Commission's jurisdiction under Section 4 to rate filings which embody a change in rate theretofore specifically agreed to between the buyer and seller and (ii) misinterprets this Court's decision in *Mobile* as supporting such a construction. (Clearly, to construe the Act as imposing this limitation upon the Commission's jurisdiction presents an important question of federal law not heretofore passed upon by this Court.)

As indicated in the Questions Presented, we believe that a primary question is whether under the Natural Gas Act buyers and sellers can agree that the seller may, from time to time, make changes in rate schedules by *ex parte* filings with the Commission. This brief will be limited to setting forth some of the practical problems of purchasers which will result if this Court should fail to review and reverse the decision of the court below that *ex parte* rate adjustments cannot be filed under Section 4(d) of the Act.

As noted above, Columbia Companies are among the very largest purchasers in the country of natural gas from Southwest pipeline suppliers. In their capacity as purchasers, their position is very similar to that of respondents in this Court (successful petitioners in the court below); thus superficially the decision below would seem to be advantageous to them. However, as *purchasers*, the Columbia Companies believe that the effect of the decision

below would be, for the immediate future and in the long run, exceedingly disadvantageous to them and to retail consumers dependent upon them for natural gas.

### A. IMMEDIATE EFFECT

Many pipeline suppliers have now pending before the Commission rate schedules, embodying changes in prior rates, which have been filed under Section 4(d) and are now the subject of Commission investigation under Section 4(e). These changed rates have not been specifically consented to by the purchasers. Such suppliers have been collecting such increased rates, subject to refund of any part of the increase not ultimately found reasonable by the Commission—in some cases for many months, and in some cases for years. The total amounts collected run to many millions of dollars. Such rate filings under Section 4 and such collections were not prevented by this Court's decision in the *Mobile* case as heretofore understood—since that decision recognized the right of natural gas companies under the Act "... to establish *ex parte*, and change at will, the rates offered to prospective customers. ..."

The decision below impels the gravest doubts as to the right of any pipeline company to retain *any* part of such past collection of increased rates, no matter what the Commission may find just and reasonable. Since its decision denies Commission jurisdiction as to such filings, it is possible that no decision by the Commission as to what rate would have been fair and reasonable can protect the pipeline companies from the loss of all the increases thus collected over months or years.

The present financial condition of many pipeline suppliers, including those supplying Columbia Companies, have been jeopardized by the decision below. As a result, it may be difficult, if not impossible, for pipeline suppliers to

finance their planned and urgently necessary expansion programs.

In the case of Columbia Companies, it is essential that they obtain from their pipeline suppliers an additional 235,000,000 cubic feet per day in order to meet the requirements of their consumers for the winter of 1958-1959. Thus, the immediate effect of the decision below is to make extremely uncertain whether the Columbia Companies will be able to fulfill their public service obligations this next winter. For that reason, it is essential that this Court grant certiorari and promptly clarify this serious situation affecting the entire natural gas industry—the sixth largest industry in the United States.

## **B. LONG RANGE EFFECT**

Under the decision below it seems no longer possible for a purchaser of natural gas whose public service obligations require an assured long term supply (20 years is general industry practice) to obtain such supply by agreeing that it will pay for gas at rates specified in seller's filed schedule and that such rates may be changed by seller's *ex parte* filing of superseding rates—those rates, however, to be subject in a proceeding under Section 4 to Commission investigation, to opposition by the purchaser, to ultimate Commission determination and refund of amounts collected over and above the ultimately fixed rate.

This has been general practice in the industry and has made 20 year contracts possible in a period of long term changes in general price levels. The decision below puts a stop to this. It denies the Commission jurisdiction to pass upon rates pursuant to this general practice. Under that decision, rates can be changed in only two ways: (i) by the Commission after a proceeding instituted on its own motion under Section 5 and (ii) by negotiation between

seller and buyer, resulting in definitive agreement upon specified rates. Either of these methods is disadvantageous to the entire natural gas industry.

Unlike retail distributors of gas (such as Columbia Companies), pipeline companies making only wholesale sales (such as the pipeline companies from which the Columbia Companies buy) have no legally enforceable public service obligation to provide increased gas supplies to meet increased customer needs.\* Accordingly, if such pipeline companies cannot be assured of a prompt and orderly method for obtaining changes in prices to cover increased costs, it is improbable (and perhaps impossible) that they will shoulder the burden of long term costs imposed by construction of additional facilities. Neither of the two procedures which remain available under the decision below provide a prompt or orderly method.

1. *Section 5 Investigations.* Under Section 5 the Commission must institute an investigation, hold hearings (with a tremendous burden upon its Staff to go forward with proof, which is its burden under that section), receive briefs and then issue its findings and order. This procedure is time-consuming and, not until the Commission has issued its order, can a rate change be made. Such delay would unquestionably impair the earnings of pipeline suppliers, destroying their ability to raise new capital\*\* and hence their ability to render adequate and expanding service to their customers. The Columbia Companies are dependent

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\*Section 7(a) of the Act which empowers the Commission to order a natural gas company to sell gas to persons engaged in local distribution to the public, contains an express proviso "... That the Commission shall have no authority to compel enlargement of transportation facilities for such purpose. . . ."

\*\*Under the procedures heretofore in effect, the stable earnings records of pipeline companies have enabled them to attract vast sums of new capital to finance one of the most spectacular of the post World War II developments in American industry which has brought the benefit of natural gas service to consumers in almost every one of the 48 States.

upon ever greater supplies of Southwest gas to serve the growing needs of six states and the District of Columbia. It is in the public interest and the interest of consumers to have the gas supplies available rather than to forestall and delay the granting of rate adjustments to which a pipeline supplier might be entitled.

A reading of the opinion below forces one to the conclusion that the Court of Appeals seemed desirous of limiting rate adjustments to those accomplished by the Commission in Section 5 proceedings. The Columbia Companies submit that this approach is contrary to the public interest and to the interests of consumers; this approach is contrary to that of regulatory commissions all over the country which are recognizing the need, in an inflationary period, for prompt rate adjustments to reflect increasing costs of doing business.

2. *Private Rate Negotiations.* Innumerable problems and difficulties face the negotiators who strive to arrive at firm agreements upon rates governing long term purchases of gas. The difficulties weigh particularly upon purchasers. Yet, under the decision below, *only* over rates firmly agreed upon does the Commission have jurisdiction under Section 4. So great are the difficulties of agreement that they would probably eliminate Section 4 rate adjustments and, for all intents and purposes, render Section 4(d) and 4(e) inoperative.

The difficulties of negotiation are illustrated by the following example:

Columbia Companies purchase large volumes of gas from Tennessee Gas Transmission Company. Tennessee's transmission lines extend from Texas to Eastern Massachusetts; its annual cost of rendering natural gas service to its customers, including return and related income taxes, is in excess of \$200 million; the character of service rendered

varies considerably among customers who purchase under rate schedules which are different for each of Tennessee's six geographic service zones and which have several differences within each zone. In addition, Tennessee has substantial business interests other than its regulated wholesale natural gas business.

The first step in negotiating a rate would involve a determination of the total cost of service to be paid by Tennessee's wholesale customers. This involves a determination by the buyer of: the innumerable items making up a rate base exceeding 700 million dollars; the propriety of millions of dollars of operating expenses, property and ad valorem taxes; the proper allocation of operating expenses and administrative and general expenses between Tennessee's non-utility and utility businesses; and the rate of return needed to maintain Tennessee's financial stability. Even assuming an individual buyer could make all of the above determinations with any hope of reasonable accuracy, it must then determine what part of Tennessee's total cost of service it should pay for the particular service rendered to it. Tennessee's customers extend from Tennessee to Massachusetts and the allocation of its costs as between different geographic zones is a most intricate problem. All of this must be undertaken by the purchaser without the right to inspect the books and records of Tennessee or to subpoena other necessary records and witnesses. Under these circumstances, is it reasonable to assume that

(1) Tennessee's 82 customers, with their conflicting interests, and located in different geographic zones, could, as a group, agree upon rates? or

(2) individual negotiations with those 82 customers could arrive at just and reasonable rates, without preference or discrimination? Would not the buyer with lesser bargaining power—because he was of smaller size,

or had lesser sources of information, or a more pressing need—agree on a less favorable rate than the buyer of greater bargaining power?\*

Columbia Companies, because of their additional positions as suppliers of natural gas at wholesale to non-affiliated retail distribution companies, face a further complication in negotiating rates with their suppliers. The Columbia Companies are essentially middlemen in the process of distributing natural gas. Since purchased gas is the largest cost in rendering gas service to their wholesale customers, the Columbia Companies could not agree to pay a higher rate to their suppliers unless they could *simultaneously* obtain related firm agreements on price from their wholesale customers.

Heretofore new rate schedules filed by pipeline suppliers under Section 4(d) were immediately offset by comparable filings by Columbia Companies covering their sales to the wholesale customers. That procedure has been practicable; it has not resulted in any improper enrichment of the Columbia Companies since the Commission, through its refund powers, has protected the interests of the ultimate consumer through the chain of rate schedules involved. Those workable mechanics of rate adjustments would be eliminated under the decision below and in place thereof substituted a cumbersome and, we believe, unworkable process of attempting to mesh negotiations between the pipeline suppliers and the Columbia Companies on the one hand and between the Columbia Companies and their wholesale customers on the other hand.

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\*Columbia Companies recognize that the Commission will still have its review powers, including suspension and refund authority, under Section 4(e). Thus, after long and costly negotiations by Tennessee and each of its 82 customers, there would be further delay, expense and duplication of effort in a Section 4(e) proceeding to correct the inevitable preferences and discriminations resulting from the individual negotiations.

The difficulties are enhanced by the fact that as to many aspects there must be frequent revisions of agreements between sellers and buyers. Columbia Companies and their pipeline suppliers find it necessary to agree at frequent intervals upon increased volumes of gas, new delivery points and changes in delivery pressures. The Columbia Companies' wholesale customers in many cases execute new agreements each year to cover additional requirements of gas.

Under the customary practice these have been "service agreements" and in each case have provided that the rate to be paid should be seller's filed rate or any legally superseding rate, meaning any rate filed by seller under Section 4 which stood the test of investigation by the Commission, opposition by the purchaser to such extent as it deemed necessary and ultimate determination by the Commission. Neither Columbia Companies nor their pipeline suppliers have ever intended the "service agreements" to constitute firm agreements upon specific rates to endure for the entire term (usually 20 years) for which the gas supply was to be furnished.

If, however, such service agreements are to be held (both retroactively and prospectively), as the decision below would indicate, to constitute a negotiation also of the propriety of the rate then effective, the complicated negotiations and factual determinations described above would be required frequently each time new service agreements were executed *for whatever reason*.

The foregoing enumerates only some of the practical problems created by the decision below. There are others, *e.g.*, an immediate one concerning the significance of the signing of a service agreement subsequent to the filing by Seller of a new rate schedule under Section 4(d). Will it be held that the execution of such service agreement constitutes consent to the new rate schedule even though on

the basis of industry practice there was no intent on the part of the buyer to acquiesce in, or consent to, such rate by reason of executing the service agreement?

### CONCLUSION

Clearly, the decision below presents many difficult problems for the natural gas industry. It upsets industry practices generally recognized that, as in the electric and other utility industries, a regulated company can initiate *ex parte* changes in rate schedules on file with a regulatory body of general applicability and availability. The decision would deny this right under Section 4 of the Act. Because of the far-reaching consequences and ramifications of such denial under the facts of the case below, the Columbia Companies submit that the above-captioned petitions for writs of certiorari should be granted.

Respectfully submitted,

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Dated: January 2, 1958.

### **Certification**

I, Edward S. Pinney, one of the attorneys for the Columbia Companies, amici herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 1st day of January, 1958, I served copies of the foregoing Motion for Leave to File and the annexed Brief in support of the Petitions for Writs of Certiorari in the captioned causes by mailing a copy thereof with airmail postage prepaid to each of the following at the respective addresses shown:

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JAN 27 1958

JAMES T. RAY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 93-2542

UNITED GAS PIPE LINE COMPANY, ET AL., Petitioners

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.,

On Petition for Writ of Habeas Corpus in the United States Court  
of Appeals for the District of Columbia Circuit

ANSWER OF MEMPHIS LIGHT, GAS AND WATER  
DIVISION, ET AL., TO PETITION OF UNITED GAS  
PIPE LINE COMPANY, ET AL., FOR WRIT OF HABEAS  
CORPUS TO PERMIT REVIEW OF ORDER OF  
SUPPORT OF PETITION FOR WRIT OF HABEAS  
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Memphis Light, Gas and  
Water Division and the  
City of Memphis, Tennessee

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1957

Nos. 691, 694 and 695

UNITED GAS PIPE LINE COMPANY, ET AL., *Petitioners*

V.

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.

On Petitions for Writs of Certiorari to the United States Court  
of Appeals for the District of Columbia Circuit

**ANSWER OF MEMPHIS LIGHT, GAS AND WATER  
DIVISION, THE CITY OF MEMPHIS, TENNES-  
SEE, AND MISSISSIPPI VALLEY GAS COM-  
PANY IN OPPOSITION TO MOTIONS FOR  
LEAVE TO FILE BRIEFS AMICI CURIAE IN  
SUPPORT OF PETITIONS FOR WRITS OF CER-  
TIORARI**

*To the Honorable, the Chief Justice of the United  
States and the Associate Justices of the Supreme  
Court of the United States:*

Memphis Light, Gas and Water Division, the City of  
Memphis, Tennessee, and Mississippi Valley Gas Com-  
pany, respondents in the above-captioned causes, in an-  
swer to the motions of Natural Gas Pipeline Company  
of America, et al. and of Ohio Fuel Gas Company, et al.  
for leave to file briefs amici curiae in support of the  
petitions for writs of certiorari filed by petitioners  
Federal Power Commission, United Gas Pipe Line  
Company, Texas Gas Transmission Corporation and

Southern Natural Gas Company oppose the motions and in support of their opposition respectfully show the Court the following:

1. The participation of the movants is not required to bring before this Court any facts or legal arguments that are material to the disposition of the petitions. The parties to the proceeding represent every phase of the natural gas industry and the consumer interest and are well able to present to the Court the "pertinent economic and business facts affecting the industry, consumers, investors and the general public" to the extent that such facts are germane to the disposition of the petitions and may be appropriately referred to and to present and brief the legal arguments.

2. Review of the briefs that movants would file discloses that they make no contribution of facts or of legal discussion that have not already been presented and adequately briefed by petitioners. Indeed, examination of movants' briefs reveals only reiteration in one form or another of the same, *extra* record and undocumented allegations regarding the impact of the decision below that appear in the petitions.

3. Contrary to the allegations of the Columbia Gas System movants (Ohio Fuel Gas Company, et al.), they are not in a position to present objectively the relationship of the decision below to purchasers of natural gas, for the Columbia Gas System as producer, transporter, seller and distributor of natural gas is confronted by sharp conflicts of interest that exist between these various activities. As a consequence, any presentation made by the Columbia Gas System as to the purchasers' position on the issues

presented cannot be detached and objective, for, of necessity, the Columbia Gas System is forced to take positions that accommodate all of its interests. Unlike the Columbia Gas System, however, the purchaser-respondents do not suffer from such infirmity.

4. As for the allegation of the movants Natural Gas Pipeline Company of America, et al. that they "can facilitate the Court's consideration of the legal issues" because their counsel represented the successful litigant in the *Mobile* case, respondents respectfully submit that the Court needs no such assistance in understanding its own decision and it does not follow that counsel who participated in a case is specially endowed or better equipped to explain the decision in that case.

WHEREFORE, respondents oppose the motions for leave to file briefs *amici curiae*.

Respectfully submitted,

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January, 1958

14

SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES JAN 27 1958

OCTOBER TERM, 1957

Office - Supreme Court, U.S.  
FILED

JOHN T. FEY, Clerk

~~No. 601, 602, 603~~

23, 25 & 26

FEDERAL POWER COMMISSION, UNITED GAS  
PIPELINE COMPANY, TEXAS GAS TRANSMIS-  
SION CORPORATION AND SOUTHERN NATURAL  
GAS COMPANY,

v.

*Petitioners,*

MEMPHIS LIGHT, GAS AND WATER DIVISION, CITY  
OF MEMPHIS TENNESSEE, AND MISSISSIPPI VAL-  
LEY GAS COMPANY,

*Respondents*

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICI CURIAE OF THE MEMBER MUNICI-  
PALITIES OF THE NATIONAL INSTITUTE OF MU-  
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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1957

**Nos. 691, 694 and 695**

FEDERAL POWER COMMISSION, UNITED GAS  
PIPELINE COMPANY, TEXAS GAS TRANSMIS-  
SION CORPORATION AND SOUTHERN NATURAL  
GAS COMPANY,

v.

*Petitioners,*

MEMPHIS LIGHT, GAS AND WATER DIVISION, CITY  
OF MEMPHIS TENNESSEE, AND MISSISSIPPI VAL-  
LEY GAS COMPANY,

*Respondents*

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF AMICI CURIAE OF THE MEMBER MUNICI-  
PALITIES OF THE NATIONAL INSTITUTE OF MU-  
NICIPAL LAW OFFICERS IN OPPOSITION**

**Opinions Below**

The opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet reported. (See decision printed in Federal Power Commission Petition, Appendix A, at pp. 31-42.) The Opinion of the Federal Power Commission (R. 225-247) is reported at 16 F. P. C. 19 and at 14 P. U. R. 3d 279.

## **Jurisdiction**

The asserted grounds for jurisdiction are set forth in the Petitions.

### **Question Presented**

Should the Supreme Court review a decision of the Court of Appeals construing and applying Section 4 of the Natural Gas Act which was premised entirely upon two recent decisions of this Court and effectuated those decisions by correctly holding that a unilateral filing for an increase in rates is not within the purview of Section 4 of the Natural Gas Act?

### **Statutes Involved**

The applicable provisions of the Natural Gas Act, June 24, 1938, 52 Stat. 821 as amended, 15 U. S. C. 717, *et seq.* are printed at pp. 43-47 of the Petition of the Federal Power Commission (FPC).

### **Interest of Amici Curiae**

The National Institute of Municipal Law Officers (NIMLO) is an organization of more than one thousand municipalities located in each of the 48 states, the District of Columbia, and in the territories of Alaska, Hawaii and Puerto Rico. Each member city acts through its chief legal officer, known variously as Corporation Counsel, City Attorney, City Solicitor, Director of Law, etc.

This Brief is filed pursuant to Rule 42(4) of this Court. The members of NIMLO are political subdivisions of states and this Brief is sponsored by their authorized law officers.

The issue at stake in the instant case is of vital interest to every municipality in the United States which purchases natural gas for its own consumption and whose residents are ultimate consumers of natural gas.

The members of NIMLO have been constantly alert, through their Standing Committee on Electric, Gas and Telephone Rates to all facets of the regulation of sales of natural gas. In fact, NIMLO member cities acting as spokesmen for consumers of gas residing within their corporate limits were among the sponsors of the Natural Gas Act of 1938 when it was adopted<sup>1</sup>. Since then these member cities have participated in innumerable rate and certificate proceedings before the Federal Power Commission (FPC) as representatives of consumers living within their corporate limits.

Since the decision of the Court below greatly affects the member municipalities of NIMLO and their resident ultimate consumers and since the decision of the Court below, and the decisions of this Court which it applied and effectuated, correctly construe the Natural Gas Act and serve the public interest, NIMLO opposes the grant by this Court of a Writ of Certiorari.

### **Statement of Facts**

The statement of facts is set forth by Memphis Light, Gas and Water Division, et al., Respondents, and will not be repeated herein.

### **ARGUMENT**

#### **I. The Court Below Has Correctly Construed the Mobile Decision**

Petitioners maintain that in this case (the "*Memphis*" case, as it is sometimes referred to herein) the Court below misconstrued the decision of this Court in the case of *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350

<sup>1</sup> Hearings before Committee on Interstate and Foreign Commerce, House of Rep. 75th Cong., 1st Sess. on H.R. 4008, March 24-25, 1937, pp. 46, 58, 59.

U.S. 332 (the "*Mobile*" case). A reading of the *Memphis* decision, however, makes it abundantly clear that the Court below carefully considered the *Mobile* case and correctly applied the principles enunciated therein by this Court.

This case is premised upon a construction of Sections 4(d) and 4(e) of the Natural Gas Act with regard to what constitutes the required "consent" which will permit the FPC to accept a proposed new rate schedule for filing. In *Memphis*, the Court held:

"The Supreme Court's opinion, in describing the relation of Sections 4 and 5, stated clearly that Section 4(d) was merely a requirement that the Federal Power Commission and the public be *formally notified* of any change made in any contract for the sale of gas by a natural gas company. 350 U.S. at 339. The notice contemplated by Section 4(d) is notice of the fact that the contracting parties have reformed their contract. Nothing in Section 4(e) gives the Commission authority to assist the parties in negotiating a new price term." (Petitioner FPC's Brief, Appendix p. 38. Emphasis supplied.)

Thus, it was recognized by the Court below that Sections 4(d) and 4(e) were "notice" sections and that only upon agreement by the parties on the rate could an effective rate be changed. Clearly, the instant case falls within the rule set forth in *Mobile* since as the Court below pointed out:

"We know as a fact that not only Mississippi but Texas Gas and Southern Natural as well have not consented to the amount of the new rate, since all three of them are now opposing United's increase before the Commission." (Petitioner FPC's Brief, Appendix p. 37.)

Labored argument is not required to clearly demonstrate that this case should not be before this Court. The Court of Appeals in *Memphis* merely applied the law as laid down by the Supreme Court of the United States. The Circuit Court did not dispute this Court — it merely effectuated its decision. There is, therefore, no need for this Court to grant certiorari in the instant case.

## II. The Memphis Decision Is in the Public Interest and Is Not Detrimental to the Natural Gas Industry

All Petitioners and *amici curiae* supporting their position devote page after page to arguments purporting to prove that the impact of this decision is ruination of the industry. Nothing could be further from the truth. It is obvious that the most disturbing aspect of the decision to the companies is the prospect that unilateral rate increases will no longer be permitted and as a consequence the companies can no longer file for an increase in rates, have the rates made effective, collect such rates from the ratepayers and then refund at some distant future time the amount (which is usually considerable) which has been found by the Commission after hearing not to be justified. Many companies (for example, Colorado Interstate Gas Company, one of the *amici curiae* herein) file rate increases upon rate increases with the result that millions of dollars (55 to 60 million to date in the case of Colorado Interstate) is collected from ratepayers subject to future refund.

It is not to be thought that we in any manner impugn the integrity of natural gas companies for seeking justified increases in rates, for the municipalities and the consumers whom they represent certainly desire healthy and financially strong companies. However, it is a well known fact that natural gas companies have sought higher profits and funds for capital additions by filing rate increases not based upon increases in costs but upon new methods of

rate regulation or changes in the existing method, e.g., the manner of handling depreciation, the manner of handling compensation for produced gas, the manner of handling allocation of joint costs and so on. No matter how inflated the claims may be, under the procedures argued for by Petitioners and *amici curiae*, the Commission cannot under the Act reject such filings but can only suspend the effectiveness thereof for a period of not to exceed five months. *Mississippi River Fuel Corporation v. Federal Power Commission*, 202 F. 2d 899 (3d Cir., 1953). Thus, it is the *ratepayers* who have their rates increased commensurate with the increased amount of *dollars* sought by the company. If, after a hearing, the Commission finds certain claimed amounts to be invalid, then the company refunds the money with interest at 6 percent. However, this is wholly insufficient recompense to the consumer who has been deprived of the use of his money for several years.

All *Memphis* does is to require companies to obtain consent of their customers prior to filing for an increase in rates under Section 4 of the Act. A proceeding under Section 5 of the Act is still open to the companies. It would seem elemental that if a customer of a natural gas company which in all cases are themselves either natural gas companies or distributing utilities was satisfied that the operating expenses of the natural gas company had increased to a point that relief through higher rates was necessary, then the purchaser would, with alacrity, agree to the new rate and the Commission could then adjudicate the justness or reasonableness of the proposed new rate under Section 4. Thus, the fears of the companies are difficult to understand unless we conclude that the companies merely desire *carte blanche* to seek an increase in rates which might be based upon unrealistic rates of return, or unjustified operating expenses, etc., utilize the money collected pursuant to this increase and, if their

proposal is ultimately denied, refund it in the far distant future.

### III. Consumers Will Not Suffer as a Result of the Memphis Decision

Petitioners and *amici curiae* state the proposition that consumers will suffer should the *Memphis* decision not be reversed. The *amici curiae* Columbia System companies take the position that should the *Memphis* decision stand then it would be "for the immediate future and in the long run, exceedingly disadvantageous to them and to retail consumers dependent upon them for natural gas." (*Amici curiae* Ohio Fuel Gas Company's, et al., Brief, p. 7.) In the first place, it is difficult to understand the claim of the Columbia System that it speaks for the consumers. The Columbia System is a gargantuan integrated network of companies (presided over by the holding company in New York) selling natural gas at wholesale and retail. It would seem that the only contact this concern has with consumers is either when it makes a sale of gas to a consumer or when it seeks an increase in the rate which the consumer must pay. In the second place, this tremendous concern certainly should be able to negotiate with its suppliers who desire a rate increase, (e.g., Tennessee Gas Transmission Company) and if such increase is justified, Columbia should be able to ascertain this fact and consent to the filing of the new rate. Beyond peradventure, any reasonable increase sought which is based upon accepted regulatory principles should be and undoubtedly would be acceptable to the customers of a natural gas company. The contentions to the contrary set out at length by Petitioners and *amici curiae* regarding inability to bargain, inability to ascertain with certainty what is a justified rate and what is not are merely suppositions on their part, the accuracy of which is highly doubtful.

That this is so is clearly shown by the number of rate case settlements in the Federal Power Commission. For example, the FPC stated at p. 108 of its 1955 Annual Report<sup>2</sup>

"... and the conference method in lieu of lengthy hearings, contributed greatly to the effectiveness of the Commission's program to speed up the processing of rate increase applications. This is borne out by the fact that of 39 cases disposed of only 2 required Commission decision after full hearing, *whereas 32 cases were satisfactorily concluded through conference procedure and short hearings.*" (Emphasis supplied.) See also p. 111 of the Thirty-Fifth Annual Report of the Federal Power Commission, Fiscal Year Ended June 30, 1955, issued January 3, 1956, wherein the Commission lauds the conference procedure of settling rate increase applications.)

These compromise agreements were arrived at *subsequent* to the filing for a rate increase by a natural gas company and were agreed to by all parties to the proceeding, including the customers. This is overwhelming evidence that actual agreements to justified rate increases have been entered into in the past and can and will be entered into in the future because it must be realized that the settlements agreed upon *subsequent* to a new rate filing involve municipalities, State Commissions and other intervenors all of whom must agree to these new rates.

#### IV. The Procedure to be Followed Under the Memphis Decision Cannot Harm the Companies

Further recourse is taken by Petitioners and *amici curiae* to the proposition that should rates not be made effective

<sup>2</sup> Thirty-Fourth Annual Report of the Federal Power Commission, Fiscal Year Ended June 30, 1954, issued January 3, 1955.

immediately, then certain disaster to the industry will result. They also maintain that to have the justness and reasonableness of the proposed rate passed upon *before* the new rate is put into effect, as would be the procedure under Section 5(a) of the Act, also would be disastrous. However, this is contrary to the experience of companies regulated by State Commissions. As shown in "State Commission Jurisdiction and Regulation of Electric and Gas Utilities," Federal Power Commission, June, 1954 at page 3, all State Commissions with power to regulate rates of electric and gas utilities have the power to require prior authorization of rate changes or to suspend proposed rate changes, and to initiate rate investigations of privately owned electric and gas utilities. In many of these jurisdictions increased rates cannot be made effective until after hearing and final order by the regulatory Commission. These companies whose increased rates are suspended certainly have not become bankrupt. The possibility of bankruptcy by natural gas companies is so remote as to be absurd.

In fact, while the FPC in its petition for certiorari stands shoulder to shoulder with the natural-gas industry (which it has a mandate from Congress to regulate) parading bankruptcy of the industry, unemployment and other imaginary horrors before this Court, its Chairman on January 3, 1958 stated:

"I don't profess to have unequivocal answers to them, but I will repeat that I find it difficult to believe that the Memphis decision will ultimately cause the bankruptcy of an important part of the natural-gas pipeline industry and thereby prevent the public from getting the natural gas service it needs and deserves."<sup>3</sup>

<sup>3</sup>An address by Jerome K. Kuykendall, Chairman, Federal Power Commission, before the New York Society of Security Analysts, New York, New York, January 3, 1958. See complete text appended hereto as Appendix A.

He further said in the same speech that should the *Memphis* case be upheld, then under a Section 5(a) proceeding for a rate increase "I suspect we may find that a rate case under Section 5 can be processed in much shorter time than was ever thought possible."

Where does this leave the arguments propounded by the gas industry and supported by the Federal Power Commission regarding regulatory lag and bankruptcy? It is an ineluctable conclusion that the denial of unilateral filings to the natural gas industry will not be detrimental to the industry. In fact, it would aid the industry immensely since the unilateral filings of the past have created great instability and profound confusion in the industry. The sharp increase in recent years in rate filings and in rates can be directly attributed to this practice. The ability to pass on to the customers *whatever increased amount* in rates is *sought* without any justification at the time, has contributed greatly to the pyramiding of rates in the postwar period. Since the advent of skyrocketing prices for gas in the producing fields, companies have had no incentive to bargain with sellers of gas—since all that has been required was to file an increase with the FPC and have such increase put into effect within a maximum of 6 months (and in some instances even sooner). Then the distributors and ultimately the consumers would pay the bill if and until the FPC entered an Order declaring certain claims unreasonable.

Thus, it would seem that the FPC in supporting the position of the industry is sanctioning such chaos. As this Court has frequently reminded the Federal Power Commission and as it so recently reminded it in the *Phillips*<sup>4</sup>

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<sup>4</sup> *Phillips Petroleum Company v. State of Wisconsin, City of Detroit, et al.*, 347 U. S. 672 (1954).

case in directing the Commission to exercise its jurisdiction over all sales for resale in interstate commerce:

"Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act. *Federal Power Comm. v Hope Natural Gas Co. supra* (320 U.S. at 610)." 347 U.S. at 685.

This protection is afforded the consumers through the Natural Gas Act as construed by the *Mobile* and *Memphis* cases. The companies will not suffer as a result of these decisions because any justified increases in rates would certainly be acceptable to customers and should the customers feel that the increases are not justified, then proceedings under Section 5(a) of the Act, embracing every aspect of due process under the Constitution, remain open to the natural gas companies.

### Conclusion

To use the language of Rule 19 of the Revised Rules of the Supreme Court of the United States, there are in this case no "special and important reasons" to review the decision below on writ of certiorari. As recently as 1956 (in the *Mobile* case) this Court settled the very question which Petitioners now attempt to raise again. None of the traditional reasons for the exercise of the certiorari power are present in this case. Petitioners have had all the appellate review to which they are entitled. They are not entitled to further review in this Court merely because they are dissatisfied with the decision of the Court of Appeals.

It is respectfully submitted that the *Memphis* decision of the Court below which merely effectuated the *Mobile* decision of this Court was eminently correct, that it will

not have the dire effects attributed to it by the natural gas industry and by the Federal Power Commission in their Petitions for Certiorari, and that the case is not one wherein certiorari should be granted.

Respectfully submitted,

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### Certificate of Service

We, Charles S. Rhyne and J. Parker Connor, attorneys for *amici curiae*, and members of the bar of the Supreme Court of the United States, do hereby certify that we have served upon the Solicitor General of the United States, an attorney of record for the Federal Power Commission and counsel of record for each other party, a copy of the foregoing brief *amici curiae* in opposition to the petitions for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit by depositing

true and correct copies thereof in the United States mail, first class postage prepaid, on January 27, 1958, addressed as follows:

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**APPENDIX A**

Not to be released prior to  
1:00 p.m., January 3, 1958

**AN ADDRESS BY JEROME K. KUYKENDALL, CHAIRMAN FEDERAL  
POWER COMMISSION**

**BEFORE THE NEW YORK SOCIETY OF SECURITY ANALYSTS,  
NEW YORK, N. Y.**

**January 3, 1958**

We are here today to discuss the severe case of "Memphis Blues" which now afflicts the natural gas industry. It is assumed that all of you are generally familiar with the decision of the Court of Appeals for the District of Columbia Circuit, rendered on November 21, 1957, which gave birth to these blues.

This decision completely overturned the established procedure which the entire natural gas industry, consumer interests, and the Federal Power Commission had thought, and the Federal Courts had assumed, was provided by section 4 of the Natural Gas Act. If this decision stands, a pipeline company cannot file a new rate even if the purchaser has agreed that this might be done. Under this decision, a different rate can be filed and become effective only if the purchaser has agreed in advance to the particular rate which is to be filed, or the Federal Power Commission has, under section 5 of the Natural Gas Act, completed an investigation and hearing, and issued an appropriate order.

The *Memphis* decision is an extension of the doctrine of the *Mobile* and *Sierra* cases, decided by the Supreme Court on February 27, 1956, wherein that Court held that the rate in a long term contract for the sale of gas and electricity could not be changed by the unilateral filing of a new rate subject to possible suspension by the Commission under section 205 of the Federal Power Act or section 4 of the Natural Gas Act. It should be pointed out that the facts in the *Mobile* and *Sierra* cases would, I believe, tend

to cause any judge who was unfamiliar with the regulatory process, to be sympathetic with the purchasers, the prevailing parties in those cases. Those cases are, in my opinion, excellent proof of the truth of the old adage that "hard cases made bad law."

It was quite generally thought that the effect of these two decisions could be overcome by a provision in the service agreements similar to the one which, in the *Memphis* case, has now been held to have no efficacy. If the *Memphis* case becomes the law of the land, it would seem to follow that all pipeline companies which presently are collecting increased rates subject to refund under section 4 must refund all of such sums to their customers. As of November 1, 1957, the total amount being collected subject to refund was about 217 million dollars per year, and the total amount subject to refund for the total time all existing suspended rates had been in effect was approximately the same amount. Indeed, it may rather logically be contended that all rate increases obtained at any time since the passage of the Natural Gas Act, by unilateral rate filings under section 4, are a nullity and must be refunded, with the possible exception of those cases which were settled by agreement of all parties and with approval of the Commission. I will come back to this subject in a few minutes.

What does the Federal Power Commission propose to do under such circumstances? The Commission will do all it can to obtain a review of this decision by the Supreme Court. The Solicitor General, with the cooperation of the Commission, has already filed with the Supreme Court a petition for certiorari. If certiorari is granted, the Commission will supply pertinent and factual information to the Solicitor General to assist him in urging the Supreme Court to give some priority to this case. The Solicitor General and his staff appreciate the importance of this case.

I confidently expect that the Supreme Court will grant certiorari. I am hopeful that the Court will hear and decide this case during this term. Of course no one can make a positive prediction as to what the Court's final decision will be.

In the meantime, we will do our best, with due regard for the rights of consumers, distributing companies, pipelines, and producers, to maintain equilibrium in this vast segment of our nation's economy. The *Memphis* decision will not be binding on the Commission until the mandate from the Court of Appeals reaches us. This mandate will not issue unless the Supreme Court denies certiorari. If the Supreme Court grants certiorari, no mandate will issue until the Supreme Court has finally disposed of the matter.

There is ample precedent for the Commission not to accept the doctrine of a court decision as applicable to other parties in other cases until that particular decision has become final. The *Phillips Petroleum* case is a recent example. The Court of Appeals held that Phillips was a natural gas company in May of 1953. The Supreme Court affirmed that result in June of 1954. During that interim the Commission did not attempt to force Phillips and other independent producers to comply with the Natural Gas Act. To do so would have been fruitless as well as inconsistent with the Commission's position in the Supreme Court. Undoubtedly any independent producer would have resisted any effort of the Commission to assert jurisdiction over him during that period and would have utilized appropriate court action for that purpose. The only result of such untimely efforts by the Commission would have been the creation of a great volume of litigation.

The *Memphis* decision presents an analogous situation. So long as that decision is not final, any appealable order issued by the Commission which is based on the principle involved in *Memphis*, whether in accord with, or contrary to it, will be appealed. The creation of such a mass of litigation clearly would not be in the public interest, and can, I hope, be avoided.

Nevertheless, the Commission, in an effort to avoid unnecessary litigation will not endeavor to irreparably prejudice any rights any one may now have, or hereafter acquire, if the *Memphis* decision becomes the law of the land. Although the Commission does not recognize *Mem-*

*phis* as final or binding in any manner at this time, the Commission nevertheless has not ignored the possibility that it may become so.

In an order issued this week, the Commission declined at that time to pass on a motion to dismiss a pipeline rate case, filed pursuant to section 4. In the same order, however, the Commission ordered the pipeline company to post a bond for the entire amount of the increase or supply other satisfactory evidence of ability to refund the entire amount. Personally, I believe that by such action, we have done the best that could be done, in this difficult situation, to protect the public interest.

What is in store for investors in natural gas pipeline securities if the *Memphis* case is not reversed? I do not believe that this industry necessarily must become bankrupt if this decision stands.

The demand for natural gas is as great now as it was before the *Memphis* decision. There is still a market and a seemingly insatiable demand for the product. Unlike an old overcoat or automobile, old gas supplies, previously used, cannot be made to serve longer. Where there is a demand and a supply, sales and purchases will be made. Thus the essential ingredients for a healthy industry remain.

Some pipeline companies are hopeful that they can reach a settlement of their pending cases with their customers. The City of Memphis itself has been an active and willing participant in such negotiations. Numerous distributing companies fully realize that neither they nor their customers want a refund which bankrupts the long distance transporter and terminates or even jeopardizes future service.

A number of the pipeline companies which would have to refund large sums would also receive large refunds from other pipelines from whom they have purchased. Some would receive more than they would have to refund. All companies which had to make refunds would have the right to obtain a refund of the resultant over-payment of income taxes.

The opinion in *Memphis* directed the Commission to reject the rate schedules filed by United Gas Pipeline

Company. It follows, as was mentioned earlier, that all companies similarly situated would have to do likewise, but there is another principle, not mentioned or considered by the Court, which, it seems to me, may come into play. Would the constitutional provision against confiscation of property protect a regulated company in a business affected with a public interest from refunding money to the extent that it thereby became bankrupt and thus was no longer able to render necessary service to the public?

I doubt very much if the Court comprehended the magnitude of the result of what it was doing, and realized that in addition to dealing with the price of gas to the City of Memphis, it was setting a precedent involving, as of now, more than two hundred million dollars in refunds.

Consequently, I doubt if the Court considered the constitutional point just mentioned, or considered whether or not United Gas Pipeline Company, or any company similarly situated, would be entitled to have a *quantum meruit* recovery for gas delivered, if it is not entitled to the filed rate. Those questions were not covered in the *Memphis* decision. I don't profess to have unequivocal answers to them, but I will repeat that I find it difficult to believe that the *Memphis* decision will ultimately cause the bankruptcy of an important part of the natural gas pipeline industry, and thereby prevent the public from getting the natural gas service it needs and deserves.

A number of pipeline companies had expected to raise substantial sums of money for expansion during 1958. As you know, such expansion must be approved by the Federal Power Commission before it can take place. In other words, FPC has found that it is in the public interest that the facilities of certain companies be enlarged, and has found such expansion to be feasible. It would be regrettable indeed, if this needed expansion did not take place as scheduled. The public needs the additional and improved service which would thereby be rendered, and at this time, particularly, our economy needs the benefit of the expenditure of these many millions of dollars for plant construction.

Necessity is the mother of invention. Let us all do our part in a great effort to keep the natural gas industry

alive, strong, and growing. I suspect that we may find that a rate case under section 5 can be processed in much shorter time than was ever thought possible. We know that in such a case, the pipeline company would supply all the data that our staff would request, as soon as it possibly could. When the customer companies realize that additional supplies of needed gas cannot be forthcoming until the pipeline company is first granted reasonable rates, it would seem that they would likewise cooperate to bring the case to a speedy conclusion. The Commission and its staff will, I know, do everything they can to expedite their work, so that our economy will not suffer unnecessarily, and to the end that the public will get the increased natural gas service it requires.

All of us have heretofore considered that section 5 was enacted for the purpose of providing a method of lowering rates, and have not considered its use in passing on applications to increase rates. It may be found that our rules and procedures should be revised in view of this changed situation. I am sure the Commission will revise its procedures in any way that is found to be proper and necessary to expedite action, and in so doing would be limited only by existing law and protection of the public interest.

Perhaps you people who play a part in the marketing of pipeline securities can revise your procedures and your customary way of doing business and find ways of doing your part in keeping the natural gas industry healthy and able to render service. I urge you to try your utmost to do so. In times of economic crisis, the psychological factor may tip the scales one way or another. Let us see that we who are in a position to affect psychological reactions say and do those things which will prevent a panic where no panic is called for.

The effect of the *Mobile*, *Sierra*, and *Memphis* decisions can be corrected by appropriate legislation, although such legislation could only operate prospectively. The Commission is already on record as favoring such legislation, having taken such action long before the *Memphis* decision. Such a recommendation will appear in the Commission's annual report which is now being printed.

Congress has many times demonstrated that it can act speedily when the need to do so has been shown. The Federal Power Commission will support such legislation, and I for one do not now know of any interests or groups which would oppose it if they ascertain and understand the facts.

There may be some good which will come out of the present difficult situation. Some people, both in the natural gas industry and in the political field, have oversimplified the various problems of the natural gas industry. They have believed, or have acted as though they believed, that each issue merely presented the question of "whom are you for?—the consumer or the industry?" Such persons have, for example, opposed a rate increase as an inherently evil thing, without any regard to the question of whether a rate increase was necessary in order for service to be rendered, and have opposed any legislation supported by any segment of the industry, apparently on the theory that if the industry wants it, it's bad for consumers. (Let me make it clear that I referred to "some people" only, in the preceding sentence.)

The *Memphis* decision is forcing such persons to face reality and to admit that, after all, a pipeline company must remain solvent if it is to render service. There seems to be good reason to hope that the present difficult situation will ultimately lead to creation of a better environment in which to dispose of regulatory problems.

It is always difficult for a member of a regulatory commission to speak on a subject of current interest in his field. If he succeeds in avoiding any comments which could, in or out of context, be deemed as an indication of what his commission may do in certain cases in the future, he also succeeds in boring and disappointing his listeners. If he succeeds in saying anything of interest or value to his audience, he subjects himself to the criticism that he has pre-judged issues before him. In what I have said to you today, I have tried to make a fair appraisal of the existing serious situation.

I am now ready to submit to questioning from you.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1958

23,259-26  
Nos. 891, 894 and 895

FEDERAL POWER COMMISSION, ET AL.,  
*Petitioners,*

v.

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT.

**MOTION OF NATURAL GAS PIPELINE COMPANY OF  
AMERICA, CITIES SERVICE GAS COMPANY, COLO-  
RADO INTERSTATE GAS COMPANY, EL PASO NAT-  
URAL GAS COMPANY, KANSAS-NEBRASKA NATURAL  
GAS COMPANY, INC., PACIFIC NORTHWEST PIPELINE  
CORPORATION, PANHANDLE EASTERN PIPE LINE  
COMPANY, TENNESSEE GAS TRANSMISSION COM-  
PANY, TEXAS ILLINOIS NATURAL GAS PIPELINE  
COMPANY AND TRANSCONTINENTAL GAS PIPE LINE  
CORPORATION FOR LEAVE TO FILE REPLY BRIEF  
AMICI CURIAE**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1957

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Nos. 691, 694 and 695

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FEDERAL POWER COMMISSION, ET AL.,  
*Petitioners,*

v.

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.

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ON PETITIONS FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

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MOTION OF NATURAL GAS PIPELINE COMPANY OF AMERICA,  
CITIES SERVICE GAS COMPANY, COLORADO INTERSTATE GAS  
COMPANY, EL PASO NATURAL GAS COMPANY, KANSAS-  
NEBRASKA NATURAL GAS COMPANY, INC., PACIFIC NORTH-  
WEST PIPELINE CORPORATION, PANHANDLE EASTERN PIPE  
LINE COMPANY, TENNESSEE GAS TRANSMISSION COMPANY,  
TEXAS ILLINOIS NATURAL GAS PIPELINE COMPANY AND  
TRANCONTINENTAL GAS PIPE LINE CORPORATION FOR  
LEAVE TO FILE REPLY BRIEF *AMICI CURIAE*

Natural Gas Pipeline Company of America, Cities  
Service Gas Company, Colorado Interstate Gas Company,  
El Paso Natural Gas Company, Kansas-Nebraska Natural  
Gas Company, Inc., Pacific Northwest Pipeline Corpo-  
ration, Panhandle Eastern Pipe Line Company, Ten-  
nessee Gas Transmission Company, Texas Illinois Natural  
Gas Pipeline Company and Transcontinental Gas Pipe

Line Corporation (the Companies) respectfully move for leave to file the reply brief *amici curiae* annexed hereto. The interest and reasons for allowing participation of the Companies are stated in their motion of December 31, 1957 to file a principal brief, and the Companies specifically reiterate each statement made therein.

Respectfully submitted,

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January 29, 1958.

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1957

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Nos. 691, 694 and 695

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FEDERAL POWER COMMISSION, ET AL.,  
*Petitioners,*  
v.

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT

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REPLY BRIEF FOR NATURAL GAS PIPELINE COMPANY OF  
AMERICA, CITIES SERVICE GAS COMPANY, COLORADO INTER-  
STATE GAS COMPANY, EL PASO NATURAL GAS COMPANY,  
KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., PACIFIC  
NORTHWEST PIPELINE CORPORATION, PANHANDLE EASTERN  
PIPE LINE COMPANY, TENNESSEE GAS TRANSMISSION COM-  
PANY, TEXAS ILLINOIS NATURAL GAS PIPELINE COMPANY  
AND TRANSCONTINENTAL GAS PIPE LINE CORPORATION,  
AMICI CURIAE

I

Respondents' entire position is summarized in the following sentence at page 12 of their brief: "• • • An agreement that the pipeline company may file a non-agreed rate change is simply an agreement that the pipeline company may do that which this Court has held [in *Mobile*] that it may not lawfully do."

What this Court held in *Mobile* was that a pipeline company could file any rate change under §4(d) which it could lawfully make. The only reason the rate could not lawfully be changed without the purchaser's consent in that case was that the pipeline company had contracted not to. By the same token where the agreement provides that the "company may file a non-agreed rate change", it may lawfully do so.

## II

In their point II respondents argue that the rate provisions in the service agreements involved in this case are indistinguishable from the fixed rate provisions contained in the contract presented to the Court in *Mobile*. This contention contradicts not only the finding of the Commission that the service agreements permitted the seller to make and file changes in rates under Section 4(d) of the Act, but also the construction placed upon them by the court below that they contain a "consent to the act of filing" (Resp. Br. p. 12).

In any event, we would point out that a service agreement providing for payment at a designated publicly posted rate schedule or "any effective superseding rate schedules" bears no resemblance to the contracts before this Court in *Mobile* and *Sierra*, where "individualized" agreements were negotiated and entered into at special firm rates to remain in force for specified terms of years to meet a particular purpose.

## III

In their third point, in addition to attempting to minimize the economic effect of the decision below, to which there is neither time nor space to reply at this time, respondents indulge in an extensive (and in our view

fallacious) dissertation on the alleged evils of the system of regulation established by Congress in §§ 4(d) and (e) of the Act. Actually, respondents' argument is a thinly disguised attempt to induce this Court to expunge those provisions from the Natural Gas Act almost in their entirety. For there are few wholesale sales of natural gas which are not made pursuant to some form of "service agreement" and if, as respondents contend that the court below has held, such an agreement cannot contain a provision authorizing the seller to change the rate subject to the filing, review and refunding provisions of §§ 4(d) and (e), those sections cease to have any real meaning or effect.

Respondents' real contention is that it would be in the public interest (as they see it) for this Court to deny certiorari, and thus to all intents and purposes strike §§ 4(d) and (e) from the Act. We submit that respondents should address that argument to Congress. Certainly, so drastic a change in existing law should not be made without full briefing and argument.

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January 29, 1958.

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MOTION FILED

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**Supreme Court of the United States**  
**OCTOBER TERM, 1958**

Nos. 23, 25 and 26

**FEDERAL POWER COMMISSION, ET AL.,**

*v.*

*Petitioners,*

**MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.,**

*Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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RADO INTERSTATE GAS COMPANY, EL PASO NAT-  
URAL GAS COMPANY, KANSAS-NEBRASKA NATURAL  
GAS COMPANY, INC., PACIFIC NORTHWEST PIPELINE  
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IN THE  
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OCTOBER TERM, 1958

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Nos. 23, 25 and 26

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FEDERAL POWER COMMISSION, ET AL.,  
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COMPANY AND TRANSCONTINENTAL GAS PIPE  
LINE CORPORATION FOR LEAVE TO FILE BRIEF  
*AMICI CURIAE***

The above companies (the Companies), pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States, respectfully move for leave to file the brief *amici curiae* annexed hereto. Consent to the filing of said brief has been denied by the respondents.

The Companies are vitally interested in the outcome of this cause. They own and operate over half of the natural gas pipe line industry's plant in this country. In the past eleven years that plant has increased some nine-fold, from \$650,000,000 in 1946 to more than \$5,750,000,000. This phenomenal growth is still in progress, and must be continued if the still unsatisfied and increasing demands for natural gas are to be fulfilled. But, as is pointed out in the annexed brief, the decision below, if not reversed, will seriously impair the ability of the industry to continue that expansion as well as to perform its existing service.

The Companies respectfully submit that they should be permitted to file the annexed brief and appendix in order to present the views of the industry as opposed to those of the Municipalities, a majority of which are served by the Companies and who appeared herein as *amici curiae* as of right in opposition to the petitions for certiorari. They also believe they are in a position to contribute to the Court's consideration of the issues on this appeal in several respects.

(1) The Municipalities assert that in its decision in *Mobile*<sup>1</sup> "this Court settled the very question which petitioners now attempt to raise again" (Mun. Br. Opp. Cert., p. 11), just as respondents assert that petitioners are merely seeking "a belated rehearing of the *Mobile* decision" (Resp. Br. Opp. Cert., pp. 8-9). Their contention is that because this Court held that the fixed-rate contract involved in *Mobile* could not be changed without the purchaser's consent, it follows that the rates in the flexible-rate service agreements here in issue likewise cannot be changed without the purchasers' consent, even though those agreements contemplate such changes.

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1. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U. S. 332 (1956).

In the annexed brief the Companies show that no issue as to the right of a selling company to increase rates under flexible-rate service agreements such as those here involved was raised or litigated in that case. On the contrary, they show that at the very time the Mobile company was successfully maintaining in the courts that the rates contained in its fixed-rate contract could not be changed by a filing made without its consent, it raised no such issue as to the type of service agreement involved here, while in the companion *Sierra*<sup>2</sup> case counsel affirmatively drew attention to the distinction between the two types of contracts as illustrating the difference between an agreement that did permit changes by filing, and one that did not. They show further that the only issue that was controverted and decided in *Mobile*, and so far as this case is concerned, in *Sierra*, was whether the Natural Gas<sup>3</sup> and Federal Power<sup>4</sup> Acts authorize companies to increase rates in violation of a fixed-rate contract. As the Companies view it, this Court's decisions that the Acts do not authorize such changes are based on the proposition that (except for the filing and review provisions) the Acts do not affect the rate-changing powers of companies subject thereto. It follows that where a company has not contracted for a fixed rate it is free to file changes without the purchaser's consent.

(2) The Companies also believe they can be of assistance to the Court in passing upon the contention of the respondents that, contrary to the findings of the Commission and to the decision below, the service agreements here in issue are in reality fixed-rate contracts and therefore indistinguishable from those involved in *Mobile* and *Sierra*. For they show that, prior to this Court's decision in *Mobile*, all of petitioner United Gas Pipe Line's customers construed the service agreements as not requiring their consent before a new rate schedule could be filed,

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2. See *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U. S. 348 (1956) (*Sierra*).

3. 52 Stat. 821, 15 U. S. C. §717, *et seq.*

4. 49 Stat. 847, 16 U. S. C. §824, *et seq.*

with full knowledge that two courts of appeal had sustained the contentions of the Mobile and Sierra companies that fixed-rate contracts could not be changed by filings made without the purchaser's consent. They show further in the annexed brief and appendix that flexible-rate provisions similar to those at bar are widely used throughout the country not only for the sale of gas, but in the electric and telephone industries as well. Nor does it appear that, prior to the decision below, the right of the seller to initiate rate changes under such agreements has ever been questioned.

(3) The Companies further believe that the annexed brief and appendix will be of assistance to the Court in evaluating the functional distinction between fixed-rate contracts and flexible-rate agreements such as those at bar. For they show that while the former are necessary to meet competitive conditions such as were present in *Mobile* and *Sierra*, in the absence of such conditions the normal and customary practice in a regulated industry is to buy and sell at whatever rate is lawfully on file at the time of delivery, as contemplated by the service agreements.

(4) Finally, the Companies show that there is no merit to the contention advanced by the Municipalities, as well as by the respondents and two members of the court below, that under the decision below, the rate flexibility necessary to enable companies to perform their services can be satisfactorily obtained under the provisions of §5(a) of the Natural Gas Act. For if the service agreements here in issue are to be equated with the fixed-rate contracts involved in *Mobile* and *Sierra* (which is the essence of the decision below), it would seem plain from this Court's opinion in *Sierra* that rates could not be increased under

§5(a) simply because they do not produce a "fair return". Thus they show that §5(a) would not be an effective substitute for §§4(d) and (e), which, as the Municipalities concede, would be substantially nullified by an affirmance of the decision below:

In order adequately to present their views on the foregoing issues, the Companies respectfully request that leave be granted to file the brief annexed hereto. They request also that in the event any such contentions as those above outlined should be made by respondents on the oral argument, their counsel be permitted to make a brief reply thereto, provided time is available.

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IN THE  
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OCTOBER TERM, 1958

Nos. 23, 25 and 26

FEDERAL POWER COMMISSION, ET AL.,  
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**BRIEF FOR NATURAL GAS PIPELINE COMPANY OF  
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URAL GAS COMPANY, KANSAS-NEBRASKA NATURAL  
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LINE CORPORATION, AMICI CURIAE**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1958

Nos. 23, 25 and 26

FEDERAL POWER COMMISSION, ET. AL.,

*Petitioners,*

v.

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET. AL.,

*Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR NATURAL GAS PIPELINE COMPANY OF AMERICA,  
CITIES SERVICE GAS COMPANY, COLORADO INTERSTATE GAS  
COMPANY, EL PASO NATURAL GAS COMPANY, KANSAS-  
NEBRASKA NATURAL GAS COMPANY, INC., PACIFIC NORTH-  
WEST PIPELINE CORPORATION, PANHANDLE EASTERN PIPE  
LINE COMPANY, TENNESSEE GAS TRANSMISSION COMPANY,  
TEXAS ILLINOIS NATURAL GAS PIPELINE COMPANY AND TRANS-  
CONTINENTAL GAS PIPE LINE CORPORATION, *AMICI CURIAE*

The interest of Natural Gas Pipeline Company of  
America, Cities Service Gas Company, Colorado Inter-  
state Gas Company, El Paso Natural Gas Company,  
Kansas-Nebraska Natural Gas Company, Inc., Pacific  
Northwest Pipeline Corporation, Panhandle Eastern Pipe  
Line Company, Tennessee Gas Transmission Company,  
Texas Illinois Natural Gas Pipeline Company and Trans-  
continental Gas Pipe Line Corporation (the Companies)  
in this cause is set forth in their motion to which this  
brief is annexed.

## The Questions Presented

1. Was the decision of this Court in *Mobile*<sup>1</sup> that the rates under Mobile's contract with United Gas Pipe Line Company (United) could not be changed without Mobile's consent based upon a provision of the Natural Gas Act<sup>2</sup> to that effect or upon the provisions of the contract there involved?

2. If the *Mobile* decision was based on the provisions of the contract, is United powerless to file changed rate schedules without the purchasers' further consent under service agreements which provide for the sale of gas at a designated rate schedule "or any effective superseding rate schedules, on file with the Federal Power Commission"?

## Statement

United entered into service agreements to sell natural gas to petitioners Texas Gas Transmission Corporation (Texas Gas) and Southern Natural Gas Company (Southern Natural) as well as to respondent Mississippi Valley Gas Company (Mississippi). Respondents Memphis Light, Gas and Water Division and the City of Memphis (Memphis) purchase gas from petitioner Texas Gas.

The service agreements, after setting forth the term of the agreement, quantity of gas, etc., provide that "All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule \_\_\_\_\_, or any effective superseding rate schedules on file with the Federal Power Commission" (e.g., R. 64, 70). The designation of the appropriate rate schedule is inserted in the blank space, such schedule being that one of the several schedules contained in the "tariff" currently on file with the Federal Power Commis-

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1. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U. S. 332 (1956).

2. 52 Stat. 821, 15 U. S. C. §717 *et seq.*

sion (the Commission) which is available to customers in the particular category involved.

Relying on this provision of its agreements, United filed, pursuant to §4(d) of the Natural Gas Act (the Act), schedules of rates intended to supersede and increase the rates contained in the schedules on file when the service agreements were entered into (R. 55-59). The Commission, acting under §4(e) of the Act, temporarily suspended most of the new rates, ordered a hearing as to their reasonableness, and provided that in general they should be effective only subject to refund pending the hearing (R. 115-18). Texas Gas, Southern Natural, Mississippi and Memphis intervened, but protested only the "reasonableness" of the new rates (R. 118-21, 128, 130-32, 133-37).

Subsequently, after this Court's decision in *Mobile*, respondents Memphis and Mississippi filed motions requesting the Commission to reject the schedules of increased rates on the asserted ground that, under that decision, such schedules could not be filed without their consent (R. 143-48, 162-66). The Commission found that the service agreements did not provide for "fixed" rates, as did the contract involved in *Mobile*, but that, on the contrary, as had been conceded by Southern Natural and Texas Gas (R. 168-69, 171-72),

"\* \* \* it was the understanding and intent of the contracting parties [as expressed in the above-quoted provision of the service agreement] to grant United the power to make changes in rates pursuant to section 4(d) of the Natural Gas Act, without waiver, however, of the right of the purchasers to oppose such changes in proceedings before the Commission [i.e., under §4(e)] for the purpose of testing the reasonableness and justness thereof." (R. 235)

Accordingly, the Commission denied the motion. Respondents sought review in the Court of Appeals for the District of Columbia Circuit.

The Court of Appeals, after quoting the above finding of the Commission, continued:

"In effect, the Commission's position is that the contractual consent to the *act of filing* is sufficient for Section 4(d). Correct though the Commission's statement of the parties' intent may be, it does not answer the question whether the Commission has jurisdiction to accept such a schedule for filing and to proceed under Section 4(e) to review United's filing of a new rate, where the level of the new rate itself has not been previously agreed upon by the parties to the contract." (R. 267)

The court then considered this Court's opinion in *Mobile* and concluded that in that case this Court had construed the Act itself as prohibiting any rate changes, regardless of the agreement between the parties, in the absence of an express agreement to the new level of rates:

"It is not sufficient for a Section 4(d) filing that United's customers have consented to allow United to have the Commission invoke Section 4(e) to review a rate increase during the contract term where the parties have not agreed to the specific rate." (R. 269)

In other words, the court below in effect held that the *Mobile* case had rendered ineffective agreements for the sale of gas at the filed or "posted" rate as the same may be changed from time to time by the seller subject to the filing and review provisions of the Act.

### Summary of Argument

The underlying error of the court below is that it proceeds on the assumption that this Court's decision

*Mobile* that a change in a fixed rate could not be made and filed without Mobile's consent was based upon a construction of §§4(d) and (e) of the Act rather than upon the provisions of Mobile's contract with United. The basic issue controverted throughout the *Mobile* litigation and decided by this Court in that case was whether the Natural Gas Act empowered United to abrogate a contract to sell gas at a fixed rate for a term of years by filing a schedule of higher rates without Mobile's consent. This Court held that it did not, for the express reason that, apart from the provisions for notice by filing and review, the Act did not affect the rate-making or rate-changing powers of natural gas companies. Accordingly, United's attempt to change the fixed-rate contract without Mobile's consent was a "nullity". But this followed from the application of basic principles of the law of contracts, rather than from §§4(d) and (e) of the Act.

To be sure, in reaching its conclusion, this Court held that §§4(d) and (e) of the Act did not of themselves authorize unilateral rate changes which were prohibited by contract, and the court below seems to have concluded from this that this Court affirmatively held that those sections prohibited the filing of rate changes even though expressly authorized by a service agreement. This is a complete *non sequitur*, and is directly contrary to this Court's decision in *Mobile* that the Act did not affect the power of natural gas companies to initiate rate changes.

It follows from this Court's decision in *Mobile* that whether or not a natural gas company may file changes in rates without the purchaser's consent depends upon its contractual arrangements with the purchaser, and not upon the filing provisions contained in the Act. If the selling company has agreed to serve at a fixed rate, it is without power to change the rate without the purchaser's consent. But if the purchaser has agreed to buy at whatever rates

may be lawfully on file at the time of delivery, the selling company has "power" to file and the Commission has "jurisdiction" to accept such changes under §4(d) and review them under §4(e).

There can be no doubt that it was the intent of the parties that under the service agreements here in issue, the selling companies could file rate changes from time to time, subject only to Commission review. The Commission has so found; the court below has accepted that finding; prior to this Court's decision in *Mobile* all the parties to the agreements so construed them; and, finally, similar service agreements which are in wide use throughout the country have been universally so construed. Indeed, in the absence of special competitive circumstances such as those present in *Mobile*, *Sierra*<sup>3</sup> and *Tyler*<sup>4</sup>, the customary practice in a regulated industry is to sell at whatever rate may be lawfully on file at the time of delivery, and that is what the service agreements in issue are intended to provide.

Moreover, if the decision below were affirmed, the rate flexibility necessary to enable natural gas companies to maintain existing services and meet demands for expansion at reasonable rates would be impossible of achievement. For if the service agreements are treated as if they were contracts for a fixed rate, which is the basis of the decision below, the rates contained therein could not be changed under §5(a) until the natural gas companies were already in serious financial difficulties.

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3. *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U. S. 348 (1956).

4. *Tyler Gas Serv. Co. v. Federal Power Comm'n*, 247 F. 2d 590 (D. C. Cir.), *cert. denied*, 355 U. S. 895 (1957).

## ARGUMENT

### I

It is clear from the opinion of this Court in *Mobile* that United had power to file the rate schedules here in issue without the purchasers' further consent, unless it had expressly contracted that power away.

As this Court pointed out in *Mobile*: "Admittedly the Act presumes a capacity in natural gas companies to make rates and contracts and to change them from time to time, but nowhere in the Act is either power defined" (350 U. S. at 343). The principal question controverted in that case, as well as in the companion *Sierra* case, was whether that power extended to the point of authorizing companies to change rates in violation of a fixed-rate contract. It is our contention that this Court's reasoning in enforcing the *Mobile* contract in accordance with its terms requires the reversal of the decision below that rates cannot be changed without the purchasers' consent even where the agreements contemplate such changes, while the respondents and Municipal *amici curiae* contend that the *Mobile* opinion supports the decision below and assert that our position is merely an attempt to obtain a "belated rehearing" of a question "settled" in *Mobile*. Before discussing this Court's opinion, we think it appropriate to show not only that no issue as to flexible-rate agreements was presented in *Mobile* or *Sierra* but also that the significance of the distinction between such agreements and a fixed-rate contract was recognized during the course of the litigation of those cases.

## A

The history of the *Mobile* and *Sierra* litigations affirmatively shows that no question as to the right of a selling company to make and file rate changes under flexible-rate service agreements such as those here in issue was raised or litigated by any party in those cases.

As this Court knows, the contracts involved in the *Mobile* and *Sierra* cases provided for special low rates for a specified period of time to which the selling company had agreed—in *Sierra* in order to retain an existing customer and in *Mobile* in order to obtain a new one. Yet at the very time the two buying companies were insisting in the courts that *those* contracts could not be changed by a filing made without their consent, *Mobile* raised no question as to the right of *United* to make and file rate changes without its consent under the identical form of service agreement here in issue, while during the course of the *Sierra* litigation a similar type of flexible-rate agreement was referred to as illustrating the difference between an agreement which permits such changes and one which does not.

In its 1953 petition which initiated the ensuing litigation, *Mobile* had asked the Commission to "reject" *United's* newly filed schedules only "in so far as said Sheets apply to sales to *Mobile* for resale to *Ideal Cement Company*" (M.R. 8<sup>5</sup>), alleging that "*United's* action in filing its proposed increase" in the *Ideal Cement Company* rate "is a unilateral effort on *United's* part to abrogate or modify its contract with *Mobile*" (M.R. 11-12). On June 6, 1955, *Mobile* executed the standard form of service agreement here in issue for its general purchases from *United* (R. 232), including the provision that, "All gas delivered hereunder shall be paid for by Buyer under

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5. "M.R." refers to the *Mobile* Transcript of Record.

Seller's Rate Schedule [DG-J], or any effective superseding rate schedules, on file with the Federal Power Commission." After United, on September 30, 1955, filed the schedules of rate increases here in issue, Mobile filed a petition to intervene. In that petition, although it was filed almost a year after the Court of Appeals for the Third Circuit had sustained its contention regarding the binding nature of its special contract for resales to Ideal,<sup>6</sup> and only a few weeks before the appeal from that decision was to be argued before this Court, Mobile did not ask the Commission to reject the filing on the ground that it violated its service agreement, as it had when United attempted to increase the rate contained in its special contract. On the contrary, it opposed the filing solely on the ground that the new schedule of rates was "unreasonable, unnecessary, and not in the public interest, and should be denied by the Commission." This, of course, is merely the customary language used by a purchaser to preserve its right to contest before the Commission, in a proceeding under §4(e) of the Act, the reasonableness of rate changes lawfully filed by a seller pursuant to §4(d). Thus it is clear that Mobile was contesting solely the right of United to increase the rates contained in its fixed-rate contract for resales to Ideal<sup>7</sup>.

Similarly, during the pendency of the *Sierra* litigation, which was commenced a few months before the *Mobile* liti-

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6. See *Mobile Gas Serv. Corp. v. Federal Power Comm'n*, 215 F. 2d 883 (3d Cir. 1954), *aff'd sub nom. United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U. S. 332 (1956).

7. To be sure, some six months later, after the *Mobile* litigation had been terminated by this Court's decision and the respondents herein had filed their motions that the Commission reject United's proposed increases which form the basis of the present litigation, Mobile filed a similar motion. This was a necessary and proper precaution to protect whatever rights the proceedings initiated by these respondents might ultimately show that it possessed. However, Mobile neither appeared nor filed any brief or memorandum in support of its motion, nor did it join with these respondents in seeking to review and reverse the Commission's order denying the motions.

gation, Pacific Gas and Electric Company (PG&E), the seller under Sierra's contract, sold electric energy to another interstate purchaser, California Oregon Power Company (Copco), under a contract entered into on June 2, 1952 and filed with the Commission. After setting forth a schedule of rates, which was that provided for under PG&E's Schedule P-31, the Copco contract contained the following additional provision:

"If, as and when the Public Utilities Commission of the State of California shall (A) authorize, approve or order increases or decreases in Pacific's resale Schedule P-31, copy of which is attached hereto; or (B) fix and order some other schedule of rates to be established by Pacific in lieu of said Schedule P-31 for resale service by Pacific, then the above schedule of rates shall be increased or decreased commensurately therewith." (Hearing Ex. 6, *Pacific Gas and Electric Co.*, 7 P.U.R. 3d 256 (1954))

The Court will observe that this is but another way of saying "or any effective superseding rate schedules, on file with the \* \* \* Commission."

In its very first brief before the Commission asserting its rights under its fixed-rate contract with PG&E, Sierra called attention to this provision in PG&E's contract with Copco in support of its contention that the rate contained in its special contract could not be increased without its consent, pointing out that "If there had been any intention that the rate [in Sierra's contract] should be changeable at any time by the normal rate making process [as contended by PG&E], the contract surely would have contained a provision to that effect, such as that contained in Pacific's contract with California-Oregon Power Company" (Sierra Br., p. 48, *Pacific Gas and Electric Co.*, 7 P.U.R. 3d 256 (1954)). Counsel for PG&E replied

that "It should be evident that this formula, incorporated in a 1952 contract after Sierra had contested the right of Pacific to obtain a rate increase, *was adopted to forestall the arguments made here.*"<sup>8</sup> (Emphasis supplied) (PG&E Reply Br., p. 2, *Pacific Gas and Electric Co.*, 7 P.U.R. 3d 256 (1954))

Thus it is apparent that throughout the litigation of the *Mobile* and *Sierra* cases those companies distinguished between an agreement to purchase gas or power at a fixed rate and an agreement such as that here in issue to purchase gas at whatever rate may be lawfully on file with the Commission at the time of delivery. We submit that it follows that there is no possible basis for contending that the right of a utility to change rates under such a service agreement without the purchaser's further consent was ever presented or litigated in these cases, or that the present appeal is an attempt to "reargue" that question. On the contrary, our contention on this appeal is that the very distinction between the two types of agreement which had been recognized during the litigation in both *Mobile* and *Sierra* requires the reversal of the decision below.

## B

The basic issue controverted and settled by this Court in *Mobile* was that the Natural Gas Act neither precludes rate contracts nor, except for the provisions for notice by filing and review, affects the rate-making or rate-changing powers of natural gas companies in any way.

As we have seen, the only contention advanced by *Mobile*, and so far as the present issue is concerned, by *Sierra*, was that their fixed-rate contracts could not be

8. It is worthy of note that PG&E subsequently filed, without objection from Copco, a new schedule designated as its "Schedule R", which substantially increased the rates in this contract. (Hearing Ex. 6, *Pacific Gas and Electric Co.*, 7 P.U.R. 3d 256 (1954))

changed without their consent. As this Court will recall, the Commission and the selling companies contended in those cases that on the contrary, such unilateral changes were lawful because the Natural Gas and Federal Power Acts of themselves precluded rate contracts, and the filing provisions expressly authorized selling companies to file unilateral rate changes even though prohibited by contract. Thus the primary question presented for the determination of this Court was the effect, if any, of the two Acts on the enforceability of contracts providing for a fixed rate. As this Court put it, "Absent the Act, a unilateral announcement of a change to a contract would of course be a nullity \* \* \*."<sup>10</sup>

At the outset, the Court disposed of the contention that the Act of itself precluded rate agreements:

"In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers *may be set by individual contracts*. In this respect, the Act is in marked contrast to the Interstate Commerce Act, which in effect precludes private rate agreements \* \* \*." (Emphasis supplied) (350 U. S. at 338)

The Court then turned to the contention that §§4(d) and (e) expressly authorized unilateral changes of all rates, thus, in effect, nullifying all fixed-rate contracts. After a detailed examination of the provisions of §§4(d) and (e) of the Act, this Court rejected that contention on the ground that the Act "does not empower natural gas companies unilaterally to change their contracts."<sup>11</sup> The

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9. 49 Stat. 847, 16. U. S. C. § 824 *et seq.*

10. 350 U. S. at 339.

11. 350 U. S. at 344.

underlying error of the court below is that it assumed that in reaching that conclusion this Court was affirmatively construing §§4(d) and (e) of the Act as *prohibiting* even those rate changes authorized by the contract.

This is a *non sequitur*. That it is also a misconception of this Court's opinion is apparent from the Court's discussion of the issue:

"It is argued that this provision [§4(d)] authorizes a natural gas company to change its rate contracts simply by filing a new schedule of rates, to go into effect in no less than thirty days. On its face, however, §4(d) is simply a prohibition, not a grant of power. \* \* \* In short, §4(d) on its face indicates no more than that *otherwise valid changes* cannot be put into effect without giving the required notice to the Commission." (Emphasis supplied) (350 U. S. at 339-40)

After considering the filing and review provisions of the Act, the Court concluded that "*the initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act.*" (Emphasis supplied) (350 U. S. at 343)

Thus, it is plain that this Court did not construe the Act as placing any limitations either upon the "power" of natural gas companies to file rate changes which they were not otherwise prohibited from making (as by a contract for a fixed rate), or on the "jurisdiction" of the Commission to accept such changes for filing and review.

### C

It follows that whether or not a new rate schedule may be filed without the purchaser's consent depends not upon the filing provisions of the Act, but upon whether the selling company has contracted away its power to make such a filing.

After holding that the Act neither limits the power of natural gas companies to enter into rate contracts nor

empowers them to change such contracts unilaterally, the Court concluded:

"\* \* \* it follows that the new schedule filed by United was a nullity insofar as it purported to change the rate set by its contract with Mobile and that the contract rate remained the only lawful rate." (350 U. S. at 347)

We submit it is self-evident that the Court reached that conclusion on the basis of the contract, and not on a "construction" of §§4(d) and (e). For absent the contract calling for a fixed rate, there could be no doubt of United's right to file a new rate schedule. As we have seen, "the Act presumes a capacity in natural gas companies to make rates \* \* \* and to change them from time to time \* \* \*". (350 U. S. at 343) As this Court further pointed out:

"If the purported change is one the natural gas company has the *power* to make, the 'change' is completed upon compliance with the notice requirement and the new rate has the same force as any other rate—it can be set aside only upon being found unlawful by the Commission." (Emphasis supplied) (350 U. S. at 342)

Thus it is plain that, unless United, by entering into the service agreements here in issue, contracted away its inherent *power* to file new rate schedules without the purchasers' consent, as it had done in *Mobile*, the schedules here in issue were lawfully filed, and the decision below is in error.

## II

United did not contract away its power to file rate changes by entering into the service agreements here in issue. Accordingly, the revised schedules here in issue were lawfully filed by United and properly accepted by the Commission.

As this Court knows, the only reference to rates in the service agreements here in issue is the provision that:

"All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule , or any effective superseding rate schedules, on file with the Federal Power Commission."

The rate schedule to be identified in the blank space is the schedule applicable to customers in the same classification as the purchaser, on file at the time the service agreement is entered into.

At the outset, it is apparent on the face of the agreements that they are not the product of any "bargaining" between buyer and seller for a special rate. The buyer merely agreed to pay the rate which the Commission under its regulatory powers deemed to be "reasonable". Nor is there anything in this language which could be construed as an agreement by the seller to sell at any rate which would produce less than a "fair return". On the contrary, the words "any effective superseding rate schedules, on file with the Federal Power Commission" negate any such implication. For as we have just seen, any schedule containing a rate change which "the natural gas company has the power to make" becomes an effective superseding rate schedule upon compliance with the filing, review and modification provisions of the Act. Thus it seems clear that by entering into these service agreements, United did not contract away its "power" to make

rate changes by the normal filing process. And so the Commission with the concurrence of the court below, has expressly found.

### A

As the Commission correctly found and the court below recognized, the intent of the service agreements here in issue is to permit United to make rate changes pursuant to the filing provisions of the Act.

As we have seen, the Commission found that under the rate provisions in the service agreements here in issue,

“• • • it was the understanding and intent of the contracting parties to grant United the power to make changes in rates pursuant to section 4(d) of the Natural Gas Act, without waiver, however, of the right of the purchasers to oppose such changes in proceedings before the Commission for the purpose of testing the reasonableness and justness thereof.” (R. 235)

As we have seen also, the court below accepted the Commission's finding of the parties' intent but concluded that, nevertheless, under its construction of this Court's decision in *Mobile*, the service agreements were ineffective to accomplish their intended purpose:

“It is not sufficient for a Section 4(d) filing that United's customers have consented to allow United to have the Commission invoke Section 4(e) to review a rate increase during the contract term, where the parties have not agreed to the specific rate.” (R. 269)

This conclusion of course is based upon the court's erroneous concept that in *Mobile* this Court held that the purchaser's consent to a change in rates was required by

the Act, rather than by the provisions of the special contract involved in that case. But in any event, it is clear that the court below agreed with the Commission that the parties to the service agreements *intended* that United should have the power to make and file rate increases under §4(d) subject only to the Commission's power to review under §4(e). We think that it is also clear from what has gone before that the court below was in error in holding that, despite the intent of the parties, such an agreement was unlawful.

As the court below concedes, there can be no doubt that a contract to purchase gas at a rate to be determined from time to time by an arbitrator named in the contract would be valid and lawful, and would authorize rate changes in accordance with its terms. As there is nothing in the Act limiting the power of natural gas companies to make such contracts as they had the power to make before the Act (provided the notice and filing provisions are observed), it follows that a contract providing that the rates may be changed and filed pursuant to the express filing and review provisions of the Act is equally valid. For such a provision does not have the effect of "vesting" the Commission with any "arbitration function" not given to it by the Act, as erroneously assumed by the court below. The Commission merely accepts schedules which a natural gas company has the "power" to file, and reviews and, if necessary, modifies them in the same manner as it would any other schedules filed under §4(d) which a natural gas company has the power to file. Under the express decision of this Court in *Mobile*, since the "purported change" is here one which the company has the "power" to make under its contract, the "change" is completed upon the filing of notice under §4(d) "and the new rate has the same force as any other rate—it can be set aside only upon being

found unlawful by the Commission."<sup>12</sup> The Commission's power to review that rate and set it aside—i.e. to act as "arbiter" of its reasonableness—is vested in it by the Act, and not by the contract.

The service agreements as interpreted by the Commission are clearly lawful. As we shall see in a moment, the Commission's finding as to their intent is also amply supported by evidence and is therefore conclusive.

### B

There is no merit to respondents' contention that the interpretation of the service agreements by the Commission and the court below is erroneous and that actually they are "indistinguishable" from the contract in *Mobile*.

In their brief in opposition to certiorari, the respondents challenge the finding of the Commission as to the intent of the parties to the service agreements here in issue, notwithstanding its acceptance by the court below:

"It is clear that the 'effective superseding rate schedules' provision may not be construed as agreement by the contracting parties on a procedure for obtaining rate increases, or, as the court of appeals put it, 'consent to the act of filing' \* \* \*. The contracts in this case are, therefore, indistinguishable from the contract in the *Mobile* case." (Resp. Br. Opp. Cert., p. 12)

We submit that their contention is untenable.

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12. 350 U. S. at 342.

**(1) The difference between the fixed-rate contracts in Mobile and Sierra and the flexible-rate service agreements here in issue is apparent both from their language and from the circumstances attending their execution.**

As we have seen, the rate provisions in the service agreements evince no purpose on the part of the selling company to contract away its power to change rates. On the contrary, the provisions expressly include "effective superseding rate schedules". It is also apparent from the nature of the agreements that they are not the product of any bargaining" as to specific rates. The purchasers merely agreed to buy at whatever rate schedules were applicable to their type of service at the time of delivery.

The contract involved in *Mobile*, on the other hand, was written under the following circumstances:

"In 1946 the Ideal Cement Company (Ideal), planning to construct a cement plant in the city provided it could obtain a supply of gas at a sufficiently low rate, obtained from Mobile an agreement to furnish gas for a 10-year term at 12 cents per MCF (thousand cubic feet). Mobile, in turn, before entering into a contract with Ideal, obtained from United a 10-year contract to supply gas for resale to Ideal at the equivalent of 10.7 cents per MCF, a rate substantially lower than that for other gas furnished by United." (350 U. S. at 336)

The Mobile-United contract, embodied in a letter accepted by United, concluded as follows:

"If you agree, subject to the terms and provisions hereof, that we shall pay you and you shall accept 90% of the proceeds received by us from customer, even though 90% of such proceeds may amount to less than 16¢ per thousand cubic feet of gas [the minimum permissible under the general contract

then in effect], for all gas delivered by you to us during the period hereinabove specified and sold by us to Customer under either of the rate schedules above set out [in Mobile's resale contract with Ideal], and if the other matters referred to herein are acceptable to you, please sign this letter in duplicate, returning a copy for our files, thereby constituting this letter an agreement between us." (M. R. 94-95)

Similarly, the contract involved in *Sierra* was entered into after intensive bargaining in order to forestall a threat of competition from Shasta Dam, and contained the following rate provision:

"4. For all electric energy delivered hereunder, Sierra will pay Pacific in accordance with the following schedule of rates \* \* \*." (Transcript of Record, p. 139, *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U. S. 348 (1956))

Then followed an explicit and detailed rate schedule. But the contract contained no provision for changing the rates subject to Commission approval such as that contained in Pacific's contract with Copco hereinabove referred to,<sup>13</sup> and instead stated:

"11. This agreement shall be and remain in full force and effect until December 31, 1964; or fifteen (15) years after the date when the first 110 kv line goes into service, whichever is later, unless extended as herein provided \* \* \*." (Transcript of Record, p. 145, *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U. S. 348 (1956))

Thus it is apparent that the special contracts involved in *Mobile* and *Sierra* were simple common law contracts to buy and sell a commodity at a specified rate for a speci-

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13. See text at p. 10, *supra*.

fied term.<sup>14</sup> The selling companies had contracted away their power to change the rates during the term of the contracts. As we shall show more fully in Point III, the purpose and intent of such fixed-rate contracts are totally different from those of the flexible price provisions of the service agreements here in issue.

**(2) Prior to the decision of this Court in Mobile, all parties to these service agreements, including respondents, construed them as permitting United to file changed rate schedules.**

But in any event, if the Commission's finding as to the intent of the parties is supported by substantial evidence, it is final and binding on the courts and disposes of this issue.<sup>15</sup> Respondents assert that there is no such evidence, "contemporaneous or otherwise." (Resp. Br. Opp. Cert., p. 13) Particularly, respondent Mississippi "emphatically denies" that it ever so construed its service agreement (Resp. Br. Opp. Cert., p. 16). According to respondents, the construction advanced by petitioners and found by the Commission is "an after-rationalization born of the *Mobile* decision and advanced to avoid it." (Resp. Br. Opp. Cert., p. 14)

At the outset the record discloses that two of United's customers under these service agreements, petitioners

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14. Another example of a fixed-rate contract which the courts held binding on the seller is that between United and Tyler Gas Service Co. That contract, entered into to forestall a threat of competition from a newly discovered and adjacent gas field, was equally explicit, providing that "The price to be paid by Buyer to Seller for each one thousand (1,000) cubic feet of gas sold and delivered to Buyer hereunder shall be as follows: \* \* \*" and that "This agreement shall be for a term beginning November 5, 1940, and ending July 25, 1962." Transcript of Record, pp. 13, 5, *Tyler Gas Serv. Co. v. Federal Power Comm'n*, 247 F. 2d 590 (D.C. Cir.), cert. denied, 355 U. S. 895 (1957).

15. Section 19(b) of the Act. Also see Administrative Procedure Act, 60 Stat. 237, 244, 5 U.S.C. §1009(e).

Texas Gas and Southern Natural, concede that they construed the agreements in the same manner as do United and the Commission. The Commission's records also show that Mississippi, as well as United's other customers subject to the said agreements, so construed them from the time they were executed, at least until the decision of this Court in *Mobile*.

On September 9, 1954, United's interstate resale customers, including Mississippi and Willmut Gas and Oil Company (the other United customer which attacked the Commission's order here in question in the court below<sup>16</sup>), appeared at a hearing before the Commission called to consider the "settlement rates" proposed for the purpose of disposing of United's pending schedules of rate increases (R. 158, 187; Transcript of Record, pp. 3097, 3099, *United Gas Pipe Line Co.*, FPC Docket Nos. G-1142, *et al.*). At that hearing, counsel for Mobile expressly stated that while Mobile agreed to the settlement rates in general, it refused to accept them under its special contract for resales to Ideal Cement Company, in view of the fact that two days previously the Court of Appeals for the Third Circuit had upheld its contention that *those* rates could not be changed without its consent (Transcript of Record, pp. 3132-33, *United Gas Pipe Line Co.*, FPC Docket Nos. G-1142, *et al.*). Mississippi was represented in the same proceeding by counsel who also represented the Alabama Public Service Commission. On behalf of the latter, the said counsel concurred in Mobile's position, also citing the Court of Appeals' decision. (*Id.* at 3151) Thus it is clear that as of that date, Mississippi in particular, as well as United's other "jurisdictional" customers, were well aware that a contract calling for a fixed rate could not be changed without the purchaser's consent.

16. See *Willmut Gas and Oil Co. v. Federal Power Comm'n.* 251 F. 2d 381 (D.C. Cir. 1957).

A year later, on September 30, 1955, United filed the schedule of further increases out of which the present litigation arises. Thus at that time all of United's customers purchasing directly or indirectly under the service agreements here in issue, including these respondents, as well as Mobile and Willmut, were faced with the problem of determining whether, in view of the Court of Appeals' decision in *Mobile* (reinforced in the meantime by the decision of the Court of Appeals for the District of Columbia Circuit in *Sierra*, 223 F. 2d 605), United had the right to file schedules increasing the rate schedules referred to in those service agreements without their consent. *Not a single one of United's customers challenged United's right to do so.* On the contrary, one and all, including all of the present respondents, filed petitions to intervene solely for the purpose of preserving their rights to contest the reasonableness of the new rates. For example, respondent Mississippi's petition recited as its ground for intervention:

"Petitioner states that the rates and charges to be demanded and received by United Gas Pipe Line Company are in issue in this proceeding, and that the same *may* be unjust, unreasonable, unduly discriminatory and preferential and *may* place an undue burden upon Petitioner." (Emphasis supplied) (R. 131)

What better evidence can there be that, at least prior to the decision of this Court in *Mobile* on February 28, 1956, all parties to the service agreements here in issue, including the respondents, interpreted them as having exactly the same meaning as that found by the Commission?

(3) *We do not know of a single instance, prior to the decision below, in which the right of the seller to initiate rate changes under service agreements containing flexible-rate provisions similar to those here in issue, which are in general use throughout the country, has been questioned.*

Respondents also assert that "there was no general industry understanding with regard to the effect of the provision, which corresponded with petitioners' interpretation of the provision." (Resp. Br. Opp. Cert., p. 13) In the annexed appendix we have collected examples of the types of flexible-rate provisions in agreements in wide use throughout the country for many years not only in the gas industry, but also in the electric and telephone industries. The Court will observe that most of those agreements in some form or another contain language indicating that the parties contemplated that the rates were changeable by filing subject to such review as authorized by the pertinent regulatory statute. As far as we have been able to ascertain from correspondence with local counsel, state commissions, etc., companies using such agreements are universally permitted to initiate rate changes before the local regulatory bodies without first obtaining the further consent of the purchasers, even though in many of the states covered by the appendix fixed-rate contracts such as those involved in the *Mobile* and *Sierra* cases are honored in accordance with their terms. Indeed, we do not know of a single instance prior to the decision below where an agreement providing for flexible rates as distinguished from fixed rates has been construed as requiring the purchaser's consent to the exact level of new rates filed by the selling company. Thus it is clear beyond peradventure that it is respondents, and not the petitioners, whose present construction of the service agreements "is an after-rationalization born of the *Mobile* decision"—and advanced to bring themselves within it.

### III

In the absence of special circumstances such as those present in *Mobile* and *Sierra*, sales in a regulated industry are customarily made at the rate lawfully on file at the time of delivery. Service agreements providing for sales at such rates are necessary to enable companies to perform their services at reasonable rates in times of fluctuating costs, and fulfill a basically different economic function than special fixed-rate contracts.

In order to illustrate the difference in economic function between flexible-rate service agreements such as those here in issue and fixed-rate contracts such as those involved in *Sierra* and *Mobile*, we have conducted a survey of the various methods in use throughout the country in the sale of natural gas, as well as of electricity and telephone service. The results of that survey are reflected in part in the above mentioned appendix, where we set forth examples of the types of flexible-rate provisions used in 37 States and the District of Columbia.

At the outset it must be borne in mind that domestic retail service is frequently rendered at rates currently on file without any agreement at all. In such a situation a rate change is initiated by the selling company by filing a new rate schedule subject to approval of the state commission. The purchaser's interests are usually represented before the commission by the legal representative of his municipality. In many instances, however, domestic service, and more generally industrial service where a substantial investment by both sides is required, is rendered pursuant either to an "application for service" or a "service agreement". These agreements typically cover such matters as quantity, quality, term, etc. As we have just seen, the rate provisions contained in such agreements

almost invariably provide in some form or another that the rate shall be that set forth in the applicable rate schedule on file from time to time with the appropriate regulatory authority. This also is the general rule in wholesale interstate natural gas transactions subject to regulation by the Commission. For example, the Commission's records show that as of December, 1957, more than 1000 service agreements were on file as against less than 100 fixed-rate contracts.

Finally, there are the relatively infrequent situations where, by the force of circumstances, a special contract at fixed rates is necessary or no sale will take place at all. For example, as the opinions of this Court show, if there had been no contract for a fixed rate for a term of years in the situations presented in *Mobile* and *Sierra*, Ideal Cement Company would have erected its plant elsewhere and Sierra would have made an arrangement to obtain government power from Shasta Dam. The same situation is illustrated in the Court of Appeals' opinion in *Tyler*.

The Court will observe that in the last described situations, the sellers did not occupy a position of monopoly. The low rates were offered to obtain or retain the customer, who, but for the special contract, would have taken his business elsewhere. That, we suggest, is the essence of the distinction between the factual situation presented in *Mobile* and that in the case at bar. As this Court well knows, and as indicated long ago by the enactment of the Sherman Act<sup>17</sup>, free competition is the traditional way to get fair prices, *provided competition exists*. Where it does not exist, or for economic reasons should not be permitted, as in most utility industries, rate regulation takes its place. The primary purpose of rate regulation is to prevent the monopoly from gouging its customers. But, as Congress recognized, there are situations in the natural gas and

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17. Sherman Anti-Trust Act, 26 Stat. 209, 15 U.S.C. § 1 *et seq.*

electric wholesale fields where competition does exert its influence, so that as a practical matter special rate contracts are necessary if sales are to be made. As this Court pointed out in *Mobile*, it is in order to enable companies to meet such problems that rate contracts are expressly permitted by the Natural Gas and Federal Power Acts.<sup>18</sup> And where such contracts are entered into, for whatever reason the parties may deem to be to their advantage, the regulatory function is limited to setting the contracts aside if the public interest so requires.

We submit that when this is borne in mind, it will readily be seen that, while special rate contracts are necessary and wholesome in order to allow suppliers to meet competitive situations such as those presented in *Mobile*, *Sierra* and *Tyler*, they serve a different economic purpose than the flexible-rate agreements here involved. Indeed a moment's reflection will indicate that if a company conducts all or most of its business pursuant to fixed-rate agreements<sup>19</sup>, a period of rising costs would quickly impair the company's financial ability either to continue its service or to meet demands for expanded service. It is obviously necessary for a company to conduct most of its business

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18. It is interesting to note that the drafts of several bills which preceded the bill that became the Natural Gas Act exempted all sales for industrial use. Congress recognized that industrial gas was in direct competition with other fuels, so that it was thought that no regulation was needed. Hearings Before the House Committee on Interstate and Foreign Commerce on H. R. 11662, 74th Cong., 2d Sess. 17, 95 (1936). Also see §1(b) of H. R. 4008, 75th Cong., 1st Sess. (1937). The bill which became the Act covered sales for resale for industrial use only, see H. R. 6586, 75th Cong., 1st Sess. (1937), but was amended before its enactment to include the proviso now contained in §4(e) that the Commission should have no power to suspend filed increases in such rates.


19. As appears from the record in *Sierra*, the contract there involved related to less than 1% of the selling company's gross business. It is also self-evident that the *Tyler* and *Mobile* contracts related only to a relatively small portion of United's gross business.

on a basis permitting rates to be increased from time to time in order to meet increases in cost.

It must also be obvious that, where no competitive conditions enable the purchaser to demand and obtain a special low rate, no seller would be likely to agree to sell at a rate which will, or might in the future, produce less than a "fair return". For that is the rate to which, in the absence of his express agreement, he is entitled by law: "• • • while it may be that the Commission cannot normally impose upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract" to such a rate.<sup>20</sup> Accordingly, where regulatory statutes exist, there is no reason for the parties to agree to any rate except that on file from time to time with the appropriate regulatory commission, absent the special circumstances above referred to. That is what both parties are entitled to by law, and unless the purchaser can induce the seller to accept a lower rate, it is all either can demand. Hence, the development of the type of service agreement here in issue. It is an agreement to sell and buy defined quantities of a commodity of specified quality, etc., at whatever rate may be in effect under the appropriate regulatory procedure at the time of delivery. The price provision is merely declaratory of the legal relationship between the parties, price-wise, as it exists in the absence of a fixed-price contract. Such agreements serve a totally different function than the special fixed-rate contracts involved in *Mobile* and *Sierra*.

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20. *Federal Power Comm'n. v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956).



## IV

If, as respondents contend, the service agreements are indistinguishable from fixed-rate contracts, it is clear from this Court's decision in *Sierra* that the rate flexibility contemplated by the Act and necessary to enable natural gas companies to perform their services in times of rising costs cannot be obtained under §5(a).

The need for rate flexibility in the natural gas industry is recognized by the respondents and the municipalities appearing as *amici curiae*. Their primary objection is to the provisions of §4(e) permitting rates filed by a company to become effective subject to refund pending determination by the Commission as to their reasonableness.<sup>21</sup> Indeed they urge affirmance of the decision below on the express ground that such affirmance would substantially eliminate that provision from the Act—as indeed it would. According to the Municipalities and the respondents, as well as two judges in the court below, companies can

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21. The respondents complain particularly of the effect of the proviso in §4(e) of the Act prohibiting the suspension of rates for resales for industrial use only. As pointed out by the Court of Appeals for the Third Circuit in its opinion in *Mobile*: "The purpose of this provision, however, as stated by the Congressman who introduced the amendment, was 'to prevent suspension in cases of industrial use where there are short term contracts \* \* \*'" (81 Cong. Rec. 6727 (1937) Emphasis supplied) The clear implication is that Congress saw no purpose in temporarily protecting purchasers who had agreed contractually to an increase in rates. *Mobile Gas Serv. Corp. v. Federal Power Comm'n*, 215 F. 2d 883, 891 (3d Cir. 1954), *aff'd sub. nom., United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U. S. 332 (1956). As we have seen Congress at one time considered exempting industrial sales from regulation altogether because such sales were in direct competition with other fuels. See note 17, *supra*. But in any event, Congress enacted this provision, and we do not see what relevance its alleged defects can have to the case at bar.

apply for and obtain rate increases under §5(a) of the Act whenever their rates do not produce a "fair return", the only difference between this procedure and that provided for under §§4(d) and (e) being that the change will not become effective until after the Commission has approved or modified the requested increase.

The difficulty with this suggestion is that it is clear on its face that §5(a) prescribes no procedure whereby natural gas companies can obtain rate increases. The section is intended for the processing of complaints *against* natural gas companies and does not even authorize such companies to file complaints on their own account. As this Court pointed out in *Mobile*, all they can do is to call the Commission's attention to facts which they deem pertinent under this section, and "request" the Commission to take action thereunder. (350 U. S. at 345) Moreover, even if the Commission should act on such a request, if the service agreements here in issue are to be treated as if they were fixed-rate contracts like those in *Mobile* and *Sierra*, which is the essence of the decision below as well as of respondents' entire case, it follows under this Court's decision in *Sierra* that the rates contained in the agreements could not be set aside by the Commission simply because they produce less than a "fair return"; for, as this Court held, that is "an erroneous standard". Where a rate is fixed by contract, "the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." (350 U. S. at 355)

It is not necessary to labor the consequences to the industry if such a system were imposed, as it will be if the decision below is affirmed. Rates would be frozen

either until the customers had voluntarily agreed to an increase in their own rates or until the companies were virtually on the verge of bankruptcy. The injunction of §4(a) of the Act that "all rates \* \* \* shall be just and reasonable \* \* \*" would be incapable of fulfillment, and the rate flexibility contemplated by §§4(d) and (e) and so necessary for the continuing health and growth of the industry would be abolished.

### CONCLUSION

The decision of the Court of Appeals should be reversed and the order of the Federal Power Commission reinstated.

Respectfully submitted,

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July 3, 1958.

## APPENDIX

**Examples of flexible-rate provisions included in agreements used by gas, electric and telephone companies in intrastate commerce.**

## ALABAMA

*Gas:*

"• • • the Customer agrees to pay for all gas delivered by the Company at the Company's \_\_\_\_\_ rate now or hereafter on file with the Alabama Public Service Commission • • • provided that no rate charge hereunder shall exceed the rate prescribed or approved therefor by said Commission." (Mobile Gas Service Corporation—Form of Contract for Commercial Heating Gas Service.)

## CALIFORNIA

*Gas:*

"• • • Customer shall pay Pacific at Pacific's filed rates applicable to such service as such rates now exist and may hereafter from time to time, be altered, modified or changed pursuant to authorization of the Public Utilities Commission of the State of California." (Contract between Pacific Gas & Electric Co. and Pacific Coast Borax Co., Division of Borax Consolidated, Limited.)

"Natural gas delivered hereunder shall be paid for under Seller's Rate Schedule G-60 on file with the Public Utilities Commission of the State of California, • • • or any effective superseding rate schedule • • •" (Contract between Southern California Gas Co. and City of Long Beach.)

**"The Company will charge \* \* \* for all surplus natural gas delivered to the Customer hereinunder in accordance with Schedule NS-1, \* \* \* and as adjusted by any Supplemental Rate Sheet, properly filed with the Railroad Commission of the State of California and then in effect." (San Diego Consolidated Gas & Electric Co.—Form of Contract for Surplus Natural Gas Service.)**

***Telephone:***

**"The Applicant \* \* \* agrees to pay all charges against this service made in accordance with the Tariff Schedules now on file or subsequently filed with the said [Public Utilities] Commission." (General Telephone Co. of California—Form of Application for Service.)**

**COLORADO**

***Gas:***

**"Service furnished by Company under its 'Schedule of Natural Gas Service' is subject to the particular rate applicable, \* \* \* together with such supplements to and revisions of said Rate \* \* \* from time to time in effect and on file with the Public Utilities Commission of the State of Colorado." (Public Service Company of Colorado—General Rules and Regulations.)**

**"Service will be supplied by the Company under this agreement \* \* \* subject to the rates, rules and regulations as filed from time to time with the Public Utilities Commission of the State of Colorado." (Citizens Utilities Company—Service Agreement Form.)**

***Electric:***

**"The rates prescribed by all Rate Schedules are subject to revision upon approval of the regulatory authority having jurisdiction." (The Western Colorado Company—Electric Service Regulations.)**

## CONNECTICUT

*Gas:*

"All rates are subject to revision as filed from time to time with the Public Utilities Commission of the State of Connecticut." (Connecticut Power Co.—Rate Schedule M4—Seasonal Gas Service.)

"\* \* \* the Company agrees to supply the customer with natural gas \* \* \* at rates in accordance with the Company's Commercial-Industrial Rate No. 5 as the same shall be approved from time to time by the Public Utilities Commission \* \* \*." (Contract between Bridgeport Gas Co. and Northeastern Steel Corporation.)

*Electric:*

"This schedule may be amended, revised, repealed or withdrawn at any time and from time to time in the manner provided by law." (The Hartford Electric Light Co.—Rate Schedule for Manufacturing Service (K).)

"All rates are subject to revision as filed from time to time with the Public Utilities Commission of the State of Connecticut." (The Connecticut Power Co.—Rate Schedule B—Rate—Light and Power, Commercial and Industrial.)

## DELAWARE

*Gas:*

"This Tariff may be revised, amended, supplemented or otherwise changed from time to time, and filed with the Public Service Commission." (Delaware Power & Light Co.—Northern Division—Rules and Regulations.)

*Electric:*

"This Tariff may be revised, amended, supplemented or otherwise changed from time to time in accordance with the rules and procedures of the Public Service Commission." (Delaware Power & Light Co.—Rules and Regulations.)

## FLORIDA

### *Electric:*

"The . . . Customer shall receive and pay for all power and energy . . . in accordance with the terms and conditions of the Company's attached Rate Schedule . . . or any effective superseding and applicable Rate Schedule in effect according to approved tariff." (Florida Power & Light Co.—Standard Large Power Agreement.)

## ILLINOIS

### *Gas:*

"The Customer hereby applies to The People's Gas Light and Coke Company for gas to be supplied to the above premises and agrees:

" . . . (4) to . . . pay for the gas supplied hereunder in accordance with the terms and provisions of (a) the 'Large Volume Service' Classification and (b) the 'Terms and Conditions of Service' contained in the Company's Schedule of Rates on file, from time to time, with the Illinois Commerce Commission." (People's Gas Light and Coke Company—Application for Gas form—large volume service classification.)

### *Electric:*

"The rates, rules and regulations contained herein have been filed with and approved by regulatory authorities having jurisdiction and are subject to change or modification to conform to any change made by Company when approved or ordered by said regulatory authorities." (Union Electric Power Co.—General Rules and Regulations applying to Urban and Rural Service Areas.)

### *Telephone:*

"The undersigned requests the General Telephone Company of Illinois to furnish in accordance with its filed tariffs, telephone service . . . and agrees to pay all

charges in accordance with the tariffs now on file or subsequently filed." (General Telephone Company of Illinois—Application for Service form.)

## INDIANA

### *Electric:*

"The rate and terms and conditions herein stated are the present legal rate and terms and conditions of the Company as filed with the Public Service Commission of Indiana, and are subject to change by order or authorization of said Commission." (Public Service Company of Indiana, Inc.—Form of Contract for Electric General Light and Power Service—Rate GS.)

## KANSAS

### *Gas:*

"The rates under which the bills for service are rendered are the present legal rates of the utility on file with the Commission and are subject to change in manner authorized or permitted by law." (Kansas Power & Light Co.—Rules and Regulations (gas and electricity).)

### *Electric:*

"The price schedules specified herein are subject to change upon approval of such change by the regulatory authority having jurisdiction over the rates and charges of the Company for the service provided for in this contract." (Contract between Kansas Power and Light Company and The Butler Rural Electric Cooperative Association, Inc.)

"The rates under which the bills for services are rendered are the present legal rates of the Company on file with the Commission and are subject to change in manner authorized or permitted by law." (Western Light & Telephone Company, Inc.—Rules and Regulations.)

*Telephone:*

“ \* \* \* Any change in rates or regulations lawfully made effective by the Telephone Company shall, to that extent, act as a modification of all contracts without further notice.” (Southwestern Bell Telephone Company—Rules and Regulations Applying to All Customers’ Contracts.)

## LOUISIANA

*Electric:*

“ \* \* \* If a rate increase or decrease should be made applicable to the class of service furnished Customer, by the Company or by order or permission of any regulatory body having jurisdiction thereof, such increased or decreased rates shall be applicable to the service rendered hereunder from and after the effective date of such rate change.” (Gulf States Utilities Company—Terms and Conditions.)

## MAINE

*Electric:*

“All electric service to be furnished under this application shall be furnished subject to the Company’s Schedule of Rates \* \* \* as the same are in effect at the time service is rendered, or as thereafter changed or modified when such changes or modifications become effective.” (Central Maine Power Co.—Form of Contract for Electric Service Requiring an Extension of Line.)

## MARYLAND

*Electric:*

“All applications and agreements are taken subject to changes in or revisions of the prices charged and/or of these Rules and Regulations as lawfully filed with the Public Service Commission from time to time.” (The Potomac Edison Co.—Rules and Regulations.)

## MASSACHUSETTS

*Electric:*

"Payment for services furnished \* \* \* shall be made in accordance with the following schedule of rates and charges subject to such changes therein as the Massachusetts Department of Public Utilities or other duly constituted authorities may require, authorize or allow from time to time \* \* \*." (Contract between Fitchburg Gas & Electric Co. and Fitchburg Yarn Co.)

"If, during the term of this AGREEMENT or any continuation thereof, increased or decreased rates of EDISON \* \* \* filed with the Massachusetts Department of Public Utilities, shall become effective, the rates provided in Schedule X shall be similarly increased or decreased." (Contract between Boston Edison Co. and Boston Gas Co.)

## MICHIGAN

*Gas:*

"The Customer shall pay for such gas in accordance with the Company's Rate \* \* \* and in accordance with such future revisions and amendments thereof, supplements thereto or substitutions therefor as may be filed with and approved by the Michigan Public Service Commission during the term of this agreement." (Consumers Power Co.—Form of Contract for Natural Gas Service—Industrial or Commercial.)

\* \* \*

"Buyer agrees to pay Seller for all natural gas rendered under the terms of this agreement in accordance with Seller's Rate Schedule as described as follows \_\_\_\_\_ as filed with the Michigan Public Service Commission and as same may hereafter be legally amended or superseded." (Michigan Gas Utilities Co.—Form of Service Agreement.)

*Electric:*

"The Customer shall pay for such energy in accordance with the Company's Rate No. . . . and in accordance with such future revisions and amendments thereof, supplements thereto, or substitutions therefor as may be filed with and approved by the Michigan Public Service Commission during the term of this agreement." (Consumers Power Company—Form of Contract for Electric Service.)

"The Customer agrees that . . . he will pay for such service in accordance with the Company's rates applicable to such service, as filed with the Michigan Public Service Commission, and with any modifications thereof hereafter approved by the Commission." (Upper Peninsular Power Co.—Standard Contract for Rural Line Extension.)

*Telephone:*

"This document constitutes the entire contract between the parties subject to the Company's tariffs, and tariff changes made from time to time, filed with the Michigan Public Service Commission." (Michigan Bell Telephone Co.—Form of Contract for Announcement Service.)

**MISSISSIPPI***Electric:*

"The Agreement for Service is made expressly subject to . . . the attached Rate Schedule and any lawfully made changes therein, substitutions therefor, or additions thereto." (Mississippi Power & Light Co.—Service Policy Applying to the Supplying and Taking of Electric Service.)

**MISSOURI***Electric:*

"The rates, rules and regulations contained herein have been filed with and approved by regulatory authorities having jurisdiction and are subject to change or modification to conform to any change made by Company when

approved or ordered by said regulatory authorities." (Union Electric Company of Missouri—Urban and Rural Service Areas—General Rules and Regulations.)

"The Customer shall . . . pay . . . the Company's rates, . . . applicable to the service supplied hereunder which shall, upon the date of this agreement or any time during the period the Customer is supplied with electric service hereunder, be currently in effect as published and prescribed schedules on file with the State regulatory commission." (Kansas City Power & Light Co.—Form of Electric Service Agreement.)

## MONTANA

### *Gas:*

"Buyer shall pay Seller in accordance with rate schedule 86 . . . and any alterations or amendments thereto approved by the Public Service Commission of North Dakota . . ." (Montana-Dakota Utilities Co.—Gas Purchase Contract) (30 day cancellation period.)

## NEVADA

### *Electric:*

"These Rules and Regulations, as well as all Rate Schedules, may not be revised, waived or annulled by the Company except after approval of such action by the Public Service Commission of Nevada." (Southern Nevada Power Co.—Rules and Regulations.)

## NEW JERSEY

### *Gas and Electric:*

"Public Service may at any time and in any manner permitted by law, and the applicable rules and regulations of the Board of Public Utility Commissioners of the State of New Jersey, terminate, or change or modify by revision, amendment, supplement, or otherwise, this tariff or any part thereof, or any revision or amendment thereof or supplement thereto." (Public Service Electric and Gas Co.—General Rules and Regulations of Tariffs for Gas and Electric Service.)

## NEW HAMPSHIRE

*Gas:*

"The rates under which service will be rendered will be as follows: \* \* \* or such other rate as may be duly and legally filed and authorized by or ordered by the New Hampshire Public Utilities Commission." (Contract between Gas Service, Inc. and The Province of St. Mary of the Capuchin Order.)

*Electric:*

"Rates and Charges. Payment for services furnished, held in readiness, or made available hereunder shall be made in accordance with the following schedules of rates and charges subject to such changes therein as the Public Utilities Commission of New Hampshire or other duly constituted authorities may require, authorize or allow from time to time \* \* \*." (Contract between Concord Electric Company and St. Paul's School of Concord, New Hampshire.)

## NEW MEXICO

*Gas:*

"The Company's Special Industrial Contract Rate Schedule (No. 56), as on file and effective from time to time with New Mexico Public Service Commission, shall be applicable to all deliveries hereunder. If, during the term of this agreement, the rate to Customer is increased from that presently effective by amendment to such schedule, or by substitution of a different schedule on file and effective with such Commission \* \* \*, the Customer may at any time after such rate increase terminate this agreement by written notice fixing the date of termination, given to Company at least ten (10) days in advance of the date so fixed." (Southern Union Gas Co.—Gas Service Agreement—Interruptible Service with City of Tucumcari.)

"If during the life of this contract the State Commission having jurisdiction receives for file in authorized manner

rates that are higher or rates that are lower than those stipulated herein for like conditions of service, the Contractor hereby agrees to continue to furnish gas service as stipulated in this contract, and the Government hereby agrees to pay for such gas service at the higher or lower rates from and after the date when such rates are made effective." (Contract between Southern Union Gas Co. and Sandia Base.)

*Electric:*

"All changes duly made in the filed rate affecting terms and conditions of service under the contract between the Customer and the Company shall apply to the contract only when and as approved by the New Mexico Public Service Commission, or other regulatory body having jurisdiction, on and after the date such changes become effective." (Public Service Co. of New Mexico—Rules and Regulations.)

**NEW YORK**

*Gas:*

"Natural gas delivered hereunder shall be paid for under Service Classification No. 7 of the Company's Schedule P.S.C. No. 1—Gas, on file with the Public Service Commission of the State of New York or any effective superseding Service Classification." (Columbia Gas of New York, Inc.—Service Classification No. 7—Form of Service Agreement.)

"The subscriber . . . agrees

"To pay for gas consumed . . . at the applicable rates shown for such service in P.S.C. No. 8—Gas or superseding schedules thereof on file with the PUBLIC SERVICE COMMISSION." (Brooklyn Union Gas Company—Form of Application for Interruptible Service under Service Classification No. 5 of P.S.C. No. 8.)

## NORTH CAROLINA

*Electric:*

"All agreements and contracts for service between the Company and its customers, including the rate schedules \* \* \* are subject to such changes and modifications as from time to time may be made in the same and approved by the Commission, or otherwise imposed by lawful authority." (Duke Power Co.—Rules.)

## NORTH DAKOTA

*Gas:*

"Buyer shall pay Seller in accordance with rate schedule 86-N-1 \* \* \* and any alterations or amendments thereto approved by the Public Service Commission of North Dakota \* \* \*." (Montana-Dakota Utilities Co.—Gas Purchase Contract.) (30 day cancellation period.)

*Electric:*

"The Power Company will make its billings and the Purchaser agrees to pay for electric energy used on the basis of applicable standard published rates of the Power Company or on the basis of such standard published rates as may supersede the existing applicable standard published rates." (Otter Tail Power Co.—Service Agreement with Sheyenne River Academy.)

## OHIO

*Gas:*

"The Customer agrees \* \* \* to pay \* \* \* for gas service in accordance with the Company's rates, terms, conditions, rules and regulations applicable to the service supplied hereunder, and which shall, upon the date of this application, or at any time during the period that the Customer is supplied with gas service, as provided for herein, be currently in effect as published in schedules lawfully filed with the Public Utilities Commission of Ohio, supplements thereto and revisions thereof." (The Toledo Edison Company—Form for Application for Gas Service.)

"The applicant . . . does hereby agree to . . . pay for gas, electric, or water service, or any of them, at the applicable rates and under the rules and regulations of said Company's schedule as filed with the Public Utilities Commission of Ohio and in effect at the time of delivery." (The Dayton Power and Light Company—Terms and Conditions.) (Gas and electric.)

*Electric:*

"All contracts and applications for service are subject to change in rates, service, and in rules and regulations, hereinafter put into effect by the Company, the Public Utilities Commission, or other public authority, as provided by law." (The Cleveland Electric Illuminating Co.—General Rules and Regulations.)

**OKLAHOMA**

*Electric:*

" . . . but the Company shall have the right to amend those rates, or rules, or to make such additional rates or rules as it may deem necessary from time to time, subject to their approval by the Commission." (Public Service Co. of Oklahoma—Rules and Regulations.)

*Telephone:*

" . . . Any change in rates or regulations authorized by the legally constituted authorities acts as a modification of all contracts to that extent, without further notice." (Southwestern Bell Telephone Company—Rules and Regulations.)

**OREGON**

*Gas:*

"SUCH SERVICE is to be supplied and taken under and SUBJECT to the . . . provisions of Company's regular TARIFFS OF RATES . . . as from time to time made effective." (Portland Gas & Coke Co.—Form of Application and Contract for Gas Service.)

"This Agreement \* \* \* shall be and remain subject to the applicable provisions of said Rate Schedule 44 \* \* \* on file with the Public Utilities Commissioner of Oregon, and any lawful amendments or supplements of said Rate Schedule \* \* \*." (Portland Gas & Coke Co.—Form of Service Agreement for Schedule 44—Interruptible Industrial Service—Large Volume.)

*Electric:*

"The Rates \* \* \* herein are subject to modification or abolition in the manner prescribed by law by the Company, by the Public Utilities Commissioner of Oregon or by any public authority having jurisdiction." (California-Pacific Utilities Co.—Rule and Regulation No. 1—Notice of Filing General Terms and Conditions.)

"Rates \* \* \* herein set forth are subject at all times to change or abolition by the Company or after proceedings duly had, by the Public Service Commission of the State of Oregon or any public authority having jurisdiction." (California Oregon Power Co.—Rules and Regulations No. 1.)

## PENNSYLVANIA

*Gas:*

"\* \* \* the Company shall deliver and the Consumer shall receive gas for Industrial purposes \* \* \* subject to \* \* \* the Tariffs, \* \* \* of the Company as may be in effect from time to time and on file with the appropriate governmental authority or authorities \* \* \*." (Cumberland and Allegheny Gas Company—Industrial Service Agreement form.)

"\* \* \* said Rates \* \* \* are a part of this agreement and that when any other Rates \* \* \* are published and duly filed with the Pennsylvania Public Utility Commission they shall become a part of this contract except as to any Rates, Rules or Regulations that may be disallowed or cancelled by said Commission." (T. W. Phillips Gas & Oil Company—Application and Agreement Form for Gas for Class 1 Consumers.)

*Electric:*

"All service is subject to the \* \* \* rate schedules from time to time filed and posted by Company in accordance with the Public Utility Law of the Commonwealth of Pennsylvania. \* \* \*" (Pennsylvania Power & Light Company—Rules and Regulations.)

## SOUTH CAROLINA

*Electric:*

"All agreements and contracts for service between the Company and its customers, including the rate schedules and these service regulations, are subject to such changes and modifications as from time to time may be made in the same and approved by the Commission, or otherwise imposed by lawful authority." (Duke Power Co.—Rules and Regulations.)

## TEXAS

*Electric:*

"\* \* \* If a rate increase or decrease should be made applicable to the class of service furnished Customer, by the Company or by order or permission of any regulatory body having jurisdiction thereof, such increased or decreased rates shall be applicable to the service rendered hereunder from and after the effective date of such rate change." (Gulf States Utilities Co.—Terms and Conditions.)

"Electric service will be supplied \* \* \* in accordance with such applicable rate schedule or schedules as may, from time to time, be established by the Company." (Houston Lighting & Power Co.—Terms and Conditions for the Sale of Electric Service.)

## UTAH

*Electric:*

"The rates prescribed by all Rate Schedules are subject to revision upon approval of the regulatory authority having jurisdiction." (Utah Power & Light Co.—Rules & Regulations.)

## VERMONT

*Electric:*

"All rates in this schedule are subject to the Rules and Regulations of this schedule and any changes or additions when properly filed with the Public Service Commission." (Central Vermont Public Service Corporation—General Information.)

## VIRGINIA

*Gas:*

"Natural gas delivered hereunder shall be paid for under Rate Schedule                      of Seller's Gas Tariff on file with the State Corporation Commission of Virginia or any effective superseding Rate Schedules." (Commonwealth Natural Gas Corp.—form of service contract)

*Telephone:*

"Any changes in rates or regulations authorized by the legally constituted authorities will act as a modification of the contract to that extent, without further notice." (Chesapeake and Potomac Telephone Co. of Virginia—General Regulations of the General Exchange Tariff.)

## WASHINGTON

*Gas:*

"The Company agrees to render bills to the Customer for all gas delivered under this contract in accordance with the terms of Rate Schedule                      • • • as said Rate Schedule and Rules and Regulations are from time to time in effect in the tariff filed with the Washington Public Service Commission." (Spokane Natural Gas Co.—Form of Gas Service Contract for Service on Rate Schedules 3 and 4.)

"The undersigned • • • agrees to pay for such natural gas at the rate as may be now or hereafter fixed by said

company for the aforesaid service \* \* \*." (Pacific Natural Gas Co.—Application and Agreement for Gas Service.)

## WEST VIRGINIA

### *Electric:*

"All applications and agreements are taken subject to changes in or revisions of the prices charged \* \* \* as lawfully filed with the Commission from time to time." (Potomac Light and Power Co.—Rules and Regulations.)

## WISCONSIN

### *Telephone:*

"The customer expressly agrees to pay to the telephone company the legally authorized rates for all telephone service furnished to the customer at such rates as are now in effect or as may be hereafter authorized by \* \* \*." (General Telephone Company of Wisconsin—Contract for Telephone Service Form.)

## WYOMING

### *Electric:*

"\* \* \* should the Company, during the term of the agreement, apply for and receive the authority to revise its Standard Industrial Rate Schedule \* \* \* said revised schedule shall become the basis for charges hereafter upon notification to the Customer by the Company." (Industrial Power Energy Agreement between Black Hills Power & Light Co. and the Federal Foundry Supply Co.)

"The rates prescribed by all Rate Schedules are subject to revision upon approval of the regulatory authority having jurisdiction." (Utah Power & Light Co.—Rules and Regulations.)

## DISTRICT OF COLUMBIA

*Electric:*

"The undersigned hereby authorizes and requests the Potomac Electric Power Company to furnish electric service for his own use at any address which he may designate within the territory served by the said company, and agrees to pay for said electric service with the understanding that the furnishing of the service, the charges therefor and the time of payment thereof are to be in accordance with the company's rules and regulations and general terms and conditions now on file with and/or as filed with the proper regulatory authorities during the time of such service." (Potomac Electric Power Company—form of application for electric service.)

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1958

Nos. 23, 25 and 26

UNITED GAS PIPE LINE COMPANY,  
*Petitioner,*

v.  
MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.,  
*Respondents.*

FEDERAL POWER COMMISSION,  
*Petitioner,*

v.  
MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.,  
*Respondents.*

TEXAS GAS TRANSMISSION CORPORATION and  
SOUTHERN NATURAL GAS COMPANY,  
*Petitioners,*

v.  
MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.,  
*Respondents.*

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**MOTION OF AMERE GAS UTILITIES COMPANY, ATLANTIC  
SEABOARD CORPORATION, COLUMBIA GAS OF KEN-  
TUCKY, INC., COLUMBIA GAS OF NEW YORK, INC.,  
CUMBERLAND AND ALLEGHENY GAS COMPANY, HOME  
GAS COMPANY, KENTUCKY GAS TRANSMISSION CORPO-  
RATION, THE MANUFACTURERS LIGHT AND HEAT COM-  
PANY, THE OHIO FUEL GAS COMPANY, THE OHIO VALLEY  
GAS COMPANY, UNITED FUEL GAS COMPANY AND VIR-  
GINIA GAS DISTRIBUTION COMPANY FOR LEAVE TO FILE  
BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS.**

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July 30, 1958

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**IN THE**  
**SUPREME COURT OF THE UNITED STATES.**

**UNITED GAS PIPE LINE COMPANY**

**et al.,**

**Petitioners,**

**v.**

**Nos. 23, 25**  
**and 26.**

**MEMPHIS LIGHT, GAS AND WATER**  
**DIVISION, et al.**

**BRIEF OF THE PEOPLE OF THE STATE OF**  
**TENNESSEE, AMICUS CURIAE.**

**GEORGE F. McCANLESS,**  
**Attorney General of the State of**  
**Tennessee.**

**ALLISON B. HUMPHREYS,**  
**Solicitor General of the State of**  
**Tennessee.**

**GEORGE SHUFF,**  
**General Counsel for the Tennessee**  
**Public Service Commission.**

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IN THE  
**SUPREME COURT OF THE UNITED STATES.**

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UNITED GAS PIPE LINE COMPANY

et al.,

Petitioners,

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Nos. 23, 25  
and 26.

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**BRIEF OF THE PEOPLE OF THE STATE OF  
TENNESSEE, AMICUS CURIAE.**

---

The people of the State of Tennessee, through their Attorney General, and the Tennessee Public Service Commission, through its General Counsel, pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States, respectfully file herewith their Brief *Amicus Curiae* in the above entitled consolidated cases.

The Tennessee Public Service Commission exercises exclusive jurisdiction over all public utility regulatory matters, including the regulation of rates for privately owned natural gas utilities in the State of Tennessee.

The people of the State of Tennessee are large consumers of natural gas, practically all of which is transported into the State by large interstate pipelines. At the present time there are eight interstate pipelines serving the people of Tennessee, and an annual quantity of 125,850,000 MCF of natural gas is purchased and consumed in this State each year.

The people of Tennessee, therefore, have a vital interest in the outcome of the present case, and they feel that it is

in the public interest that the views of the Attorney General and the Tennessee Public Service Commission as expressed in this Brief be presented to the Court and would state to the Honorable Court:

POINT I.

**THE COURT OF APPEALS CORRECTLY APPLIED  
THE RULE OF THE MOBILE DECISION TO  
THE FACTS OF THIS CASE.**

The Court of Appeals was clearly correct in its characterization of the pricing provision of United Gas Pipeline Company's service agreements as merely a consent to an arbitration proceeding.

The Federal Power Commission, accepting the interpretation of the service agreement placed upon it by United and its pipeline customers stated in its Opinion No. 295:

"It is equally clear that it was the intention and understanding of the parties that the purchaser would pay the rates set out in the applicable rate schedules effective from time to time and that changes could be made therein by United under the procedures established under Section 4 of the Act. This is the only reasonable interpretation that can be given to the above-quoted contract provision as an expression of the intent of the contracting parties." (Emphasis supplied.)

Since the contracts in question were entered into prior to the **Mobile** decision, the Commission's reference to changes under the procedures established under Section 4 of the Act can only mean the procedures which the parties then thought were established under Section 4. The procedures which the parties intended for United to invoke were those which United and the Commission described to the Court in the **Mobile** case as the procedures established under Section 4. In that case Section 4 (d)

and (e) was characterized by United and the Commission 'as establishing a rate-changing 'procedure'—a 'proceeding' before the Commission 'initiated' by a natural gas company filing a 'proposed' change" (350 U. S. at 342). The nature of the proceedings which the parties had in mind is further illuminated by the Commission's recognition that the purchaser's grant of contractual power to United "to make changes in rates pursuant to Section 4 (d)" was "without waiver, however, of the right of the purchasers to oppose such changes in proceedings before the Commission for the purpose of testing the reasonableness and justice thereof."

Therefore it becomes clear that the "procedures established under Section 4 of the Act," as understood by the parties at the initiation of their contracts, were rate-changing procedures provided by Section 4 (d) and (e) and characterized by the seller's proposing of changes, the purchaser's opposing of such changes, and the Commission's determination of the contest. This description furnishes a perfect illustration of an arbitration proceeding.

In the **Mobile** case, however, this Court held (1) that Section 4 (d) did not provide for the filing of proposals with the Commission, (2) did not provide proceedings "initiated" by a rate filing, and (3) did not provide a rate-changing procedure at all.

The Court of Appeals was, therefore, clearly correct both in its construction of the arrangement described by the Commission as an agreement upon arbitration procedures with the Commission acting as arbitrator, and in its analysis of the **Mobile** decision as requiring the holding that, in the absence of provision for rate-changing procedures in the Natural Gas Act, the jurisdiction of the Federal Power Commission does not extend to the entertainment of arbitration-type rate-changing procedures initiated by the filing of proposed changes in rates.

## POINT II.

### **THE RESULT REACHED BY THE COURT OF APPEALS IS IN THE PUBLIC INTEREST.**

The Tennessee Commission, charged with the responsibility of protecting gas consumers in the State of Tennessee, has viewed with considerable concern the tremendous and rapid increases in the cost of natural gas in the fields during the last six to eight years. As recently as five years ago a price of 20¢ per MCF for gas at the well-head was virtually unknown, with prices generally ranging from 5¢ to 12¢ per MCF. Today prices in excess of 20¢ for new reserves of gas are the rule rather than the exception, and the end of the upward trend is nowhere in sight.

It was hoped that the decision of this Court in **Phillips Petroleum Company v. State of Wisconsin**, 347 U. S. 672, would result in the effective control by the Federal Power Commission of producer prices of natural gas. Events since that decision have indicated that the jurisdiction of the Commission over producer sales for resale in interstate commerce has not provided an effective check to the rise of prices.

It seems clear that the economic cause behind the increase in gas prices in the field is the combination of several factors:

(1) The virtually insatiable and constantly growing demand for natural gas which has been created by the building of major pipelines to areas to which gas has never formerly been available, as well as the expansion of the pipelines to their existing service areas;

(2) The requirement necessarily imposed by the Federal Power Commission that a pipeline desiring to take on a new market must prove that it has acquired by contract the dedication of sufficient reserves of gas to meet the expected

needs of the new market for 15 to 20 years, so that any substantial expansion of pipeline business requires acquisition of enormous reserves of gas in the field; and

(3) The fact that the incidence of increases in the cost of gas in the field has, under the method of regulation followed prior to the **Mobile** decision, fallen not upon the pipelines whose purchases determine the field prices, but upon the customers who eventually buy it from the pipelines.

These three factors have resulted in a situation where the major pipelines have been consistently bidding desperately against each other for new reserves of gas, particularly in Louisiana, Texas and Mississippi. Each pipeline has known that any increase in its average cost of service which is incurred in obtaining new reserves of gas could be immediately passed along to its customers through rate increases which would quickly become effective through proceedings under Section 4 of the Natural Gas Act. Therefore, all of the interests of the pipeline companies have been on the side of obtaining the gas, and virtually none of them on the side of maintaining a low average cost of gas. This is not to imply that the majority of the pipelines have recklessly or carelessly bid the price of gas up, but in such a situation it takes only one bidder to run the price to extremely high levels.

The decision of the Court of Appeals would not prevent a pipeline from passing along to its customers increases in its cost of service. The Commission has indicated that a rate increase obtained in a Section 5 (a) proceeding would result in the same level of rates, as if it had been obtained in a Section 4 proceeding. The only difference then is the time element.

Under the decision of the Court below a pipeline with long-term service agreements would ordinarily be required, in the absence of customer agreement to new rates, to pro-

ceed under Section 5 (a) of the Act in order to obtain rate increases resulting from increases in its unit cost of gas, and the increases would become effective only upon the conclusion of the administrative proceedings. In this way the burden of the increase in costs would rest upon the pipeline itself for several months, and thus the incidence of the increase would be shared by the pipeline and its customers. This situation would give the pipeline industry, as a whole, an incentive to hold down the prices paid for gas in the fields and would put an effective brake upon the serious upsurge in gas prices.

The purpose of the Natural Gas Act is to protect the consumers from exploitation at the hands of natural gas companies. **Federal Power Commission v. Hope Natural Gas Company**, 320 U. S. 591. An interpretation of that Act which places upon natural gas pipeline companies a strong economic incentive against increasing their costs of service effectively promotes the basic purpose of the Act.

**CONCLUSION.**

Accordingly, it is earnestly submitted that the decision of the Court of Appeals is correct in its conclusions as to the facts and its analysis of the law, and produces a result which is in the public interest and promotes the purposes of the Natural Gas Act.

Respectfully submitted,

**GEORGE F. McCANLESS,**  
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**ALLISON B. HUMPHREYS,**  
Solicitor General of the State of  
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**GEORGE SHUFF,**  
General Counsel for the Tennessee  
Public Service Commission.

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**SUPREME COURT. U. S.**

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**In the**

**Supreme Court Of The United States**

**October Term, 1958**

**Nos. 23, 25, and 26**

**UNITED GAS PIPE LINE COMPANY,  
FEDERAL POWER COMMISSION, TEXAS  
GAS TRANSMISSION CORPORATION, AND  
SOUTHERN NATURAL GAS COMPANY,**

***Petitioners,***

***v.***

**MEMPHIS LIGHT, GAS AND WATER DIVISION,  
CITY OF MEMPHIS, TENNESSEE, AND  
MISSISSIPPI VALLEY GAS COMPANY,**

***Respondents.***

**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**BRIEF AMICUS CURIAE OF THE STATE OF WISCONSIN**

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In the  
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---

**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

**BRIEF AMICUS CURIAE OF THE STATE OF WISCONSIN**

---

**INTEREST OF THE STATE OF WISCONSIN**

The State of Wisconsin as parens patriae is directly interested in protecting the consumers of natural gas in the State of Wisconsin and thereby indirectly assisting in protecting the consumers of natural gas everywhere.

The State of Wisconsin files this brief amicus curiae in support of the position of respondents, Memphis Light, Gas and Water Division, City of Memphis, Tennessee, and Mississippi Valley Gas Company, that a natural gas company cannot by its own unilateral action increase any existing rates on existing customers in advance of the approval of that rate by the Federal Power Commission, and thereby, if the proposed new rate is finally held excessive, as such rates often are, extort meanwhile a forced loan from the consumers.

The State has an interest that in this proceeding there shall not be established a precedent that would in other actions adversely affect the interests of consumers of natural gas in the State of Wisconsin, that is, the citizens of the State, and the State itself.

The right of the State of Wisconsin to appear as a party when its citizens are directly affected, rather than indirectly, is established by the case of *Phillips Petroleum Co. v. Wisconsin*; (1954) 347 U. S. 672, which held on the merits, in accordance with the Wisconsin position, that any sale of natural gas for resale in interstate commerce was subject to rate regulation by the Federal Power Commission.

This brief is filed for the State of Wisconsin by its Attorney General in accordance with the permission granted by the Court by its Rule 42, (4).

### **OPINION BELOW**

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 250 F. 2d 402.

### **JURISDICTION**

The jurisdiction of this court rests upon 28 U. S. C. 1254 (1) and Section 19 (b) of the Natural Gas Act, 15 U. S. C. 717r (b). The order granting certiorari was made February 3, 1958, 355 U. S. 938.

## QUESTION PRESENTED

Respecting always the beliefs of the parties to the case as to the issues to be considered and resolved, and recognizing always that only the issues below can be considered on appeal, we most respectfully suggest to the Court that there is only one single and simple issue in the case, and that issue is properly stated:

After the decision in the *Mobile case*,<sup>1</sup> can a natural gas company ever again inflict a unilateral rate increase upon an existing customer?

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<sup>1</sup>United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U. S. 332.

## STATUTE INVOLVED

A complete statement of the statute involved is made by the appendices to the briefs of the petitioners. We are here setting forth as a matter of convenience only such portions of paragraphs 4 and 5 of the Natural Gas Act of 1938, 52 Stats. 821, as amended, 15 U. S. C. §§ 717 *et seq.*, as are material to the special argument which we raise.

Sec. 4(e) reads in part:

"Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any *State, municipality, or State commission*, or upon its own initiative without complaint, at once, and if it so orders; without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service \* \* \*." (Emphasis supplied.)

Sec. 5(a) reads in part:

"Whenever the Commission, after a hearing had upon its own motion or upon complaint of any *State, municipality, State commission, or gas distributing company*, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order \* \* \*." (Emphasis supplied.)

## STATEMENT OF FACTS

The statement of facts is set forth by Memphis Light, Gas and Water Division et al., respondents, and will not be repeated here.

At this point we will merely point out briefly that the natural gas industry, considered in its entirety, is like no other industry. We have on the one hand the supplier or producer of natural gas as the source of supply; on the other hand there is the distributing company which sells to the consumer; and tying the two together, the gigantic interstate pipe line companies. These companies cannot obtain a license to engage in business without the consent of the Federal Power Commission. While the initial arrangements of the pipe line company with the supplier of gas and the distributing company are based on contracts, those contracts are subject to review by the Federal Power Commission, but when they have been accepted, the companies never again can escape from those contracts, or even change the content thereof, without the approval of the Federal Power Commission.

This condition is necessary on the one hand so that improvident pipe line companies will not be established without adequate reserves of natural gas with a life sufficient at least to protect and preserve the investment of the public in the securities of the pipe line company which must be issued in order that the pipe line can be built, and on the other hand, to protect the distributing company and its purchasers of gas from unwarranted and improper initial contracts or increases in the rates charged for natural gas. Such Commission control is necessary since, once the sys-

tem has been established, the rates can never thereafter be varied except with the approval of the Federal Power Commission. Accordingly, the Commission must find that the initial rates are just and reasonable.

The consumers of natural gas who consume large volumes of gas, particularly the residential space heaters, if they may not be bound by contract to continue to purchase gas from the distributing companies, are certainly economically bound, first by the large size of the investment that they have made in equipment for the use of natural gas, and second, by the fact that they thereafter can purchase natural gas from no other supplier.

Hence, the consumers are in effect the fourth parties to every series of contracts (between supplier, pipe line, and distributor) which initially establish the natural gas system, and which may be varied thereafter. Their interest will be further discussed in the argument.

## ARGUMENT

### *Introductory Statement*

As we read the briefs of the petitioners, they appear to be devoted to the presentation of almost 150 pages of glosses upon the opinion of this court, now barely two years old, in the *Mobile case*.<sup>1</sup> We can think of no more unrewarding occupation. We shall base our argument simply upon the proposition that the same elementary principles of right and justice which led the court to its decision in the *Mobile case* should lead to a similar result in the present *Memphis case*. Of these principles the most fundamental for this in-

<sup>1</sup>United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U. S. 332.

dustry, which is based on contracts, is the preservation of the integrity of the contract, together with the rights of all parties affected to insist that an existing contract continue until it is modified by the mutual acquiescence of all parties concerned, or by a decision of a regulatory body such as the Federal Power Commission, which has jurisdiction over such contracts after hearing.

# **I. THE NATURAL GAS ACT IS DESIGNED AND INTENDED BY THE CONGRESS TO PROTECT THE CONSUMER**

Consistent with this intention, the consumer can never be charged a rate other than a rate based on contract acquiesced in by all parties, or a rate finally fixed by the Federal Power Commission.

The intention of the Congress to protect the consumers is established both by internal evidence in the Natural Gas Act itself and by repeated decisions of this Court.

## ***A. Internal Evidence in the Act***

There are two salient features of the act found in secs. 4(e) and 5(a) which we have not found adequately discussed in the briefs of any of the petitioners.

Referring first to sec. 4(e), we find that the only parties who may complain of a newly filed rate schedule as a matter of right are "any State, municipality, or State commission."

Therefore, if petitioners are correct in their contention, if a supplier of gas under a contract drawn in the combined service agreement and tariff form decides to raise the rate to its pipe line, or the pipe line decides to raise the rate to its distributing company, neither of the respective junior companies has any right to complain against the newly filed schedule. The only persons who may complain as a matter of right are the representatives of the consumer; that is, the State, municipality or State Commission. While it is anticipated, apparently, that the Federal Power Commission shall also undertake to protect the interests of the consumer, it is notable that if the Federal Power Commission finds no objection to the newly filed schedule, neither the pipe line company nor the distributing company could ever get a hearing before the Commission or get into court in any manner to review the sufficiency or propriety of the newly filed schedule.

We respectfully submit that this section alone is clear evidence of the Congressional intent that the procedure established under the entire section 4 was intended for consumer protection, and not as a rate-making device where rates could be put into operation and collected under bond if the Federal Power Commission did not complete a hearing thereon within five months. There are many typical cases where the provisions of sec. 4, and particularly the review procedure of sec. 4(e), may come into operation.

First, assume the supplier and the pipe line company, by mutual acquiescence, increased the rates to be paid by the pipe line company to the supplier. If the distributing company objected to such a rate, it could not complain.

However, the State, the municipality or State commission could complain.

Secondly, assume again that the pipe line company and the distributing company should enter into a new contract for an increased rate. This is a situation that is not rare as claimed in the brief of one petitioner, but often happens, particularly when the pipe line company and the distributing company are owned by the same holding company and have interlocking officers and boards of directors. Here the distributing company, having acquiesced either expressly or by silence in the new contract, could not seek a review, but the representatives of the consumer—that is, the State, municipality or State commission—would be entitled to demand a review under sec. 4(e). In that case, if the Federal Power Commission did not complete its hearing within the 5-month allotted span, the company could put its rate into effect and proceed to collect it under bond.

The second notable item of internal evidence in the Act is found in the fact that sec. 5(a) in addition to naming the State, municipality or State commission, names a "gas-distributing company" as a party who can invoke the provisions of that Act. This section would appear to confer a right on companies further down the line who objected to a rate increase from the superior company to file a protest. The fact that they are included as a named party who may initiate an action of right under secs. 5(a) but are not named in sec. 4(e), by the familiar rule of *expressio unius est exclusio alterius* is evidence of an intent that they were never to have such a right under sec. 4(e).

We note that counsel for the Federal Power Commission has called attention to the fact that if the Federal Pow-

er Commission itself initiates a review under section 4, then any gas company affected may file a petition for intervention under sec. 15(a). However, this is far from a right to seek a review under sec. 4. Hence, as we have indicated above, if the Federal Power Commission finds no fault with the filed rates, there is no proceeding in which the affected gas company can intervene.

***B. The Leading Opinions of This Court Confirm the Intent of Congress to Protect Consumers***

On this point we will simply quote from four leading cases decided by the court within the last 15 years:

"The primary aim of this legislation. (Natural Gas Act) was to protect consumers against exploitation at the hands of natural gas companies." *Federal Power Commission v. Hope Natural Gas Co.*, (1944) 320 U. S. 591, 610.

"We have held that these sales are in interstate commerce. It cannot be doubtful that their regulation is predominantly a matter of national, as contrasted to local concern. All gas sold in these transactions is destined for consumption in States other than Louisiana. Unreasonable charges exacted at this stage of the interstate movement become perpetuated in large part in fixed items of costs which must be covered by rates charged subsequent purchasers of the gas, including the ultimate consumer. It was to avoid such situations that the Natural Gas Act was passed." *Interstate Gas Co. v. F. P. C.*, (1947) 331 U. S. 682, 692.

"The aim of the [Natural Gas] Act was to protect ultimate consumers of natural gas from excessive charges. See *Federal Power Commission v. Hope Natural Gas Co.*, *supra*, at 610, 612. They were the intended

beneficiaries of rate reductions ordered by the federal commission; though state machinery might have to be invoked to obtain lower rates at the consumer level." *FPC v. Interstate Natural Gas Co.*, (1949) 336 U. S. 577, 581.

"Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act. *FPC v. Hope*, *supra*, at 610. Attempts to weaken this protection by amendatory legislation exempting independent natural-gas producers from federal regulation have repeatedly failed, and we refuse to achieve the same result by a strained interpretation of the existing statutory language." *Phillips Petroleum Co. v. Wisconsin*, (1954) 347 U. S. 672, 685.

### *C. Unilateral Advances in Rates Are Injurious to the Consumer*

When one of the gas companies in the chain of supply files a schedule for an increased rate which is ultimately disallowed by the Federal Power Commission, the consumer, upon whom that rate must ultimately fall, has, in effect, been compelled to make a "forced loan" to the company which has been able to collect that increased rate under bond for the period during which the case is under advisement.

While the receiving company must repay the overpayment with interest, during these periods of expansion the companies appear to be very happy to get these extra payments as working capital, rather than to go to a bank or other proper lending agency to obtain such capital.

The problems of repaying these funds to the thousands of thousands of consumers entitled thereto have become

astronomical. The clerical expense of repayment will be charged as an operating expense by the repaying company.

When it is considered that some of these rate-fixing procedures can drag on upwards as much as 10 years, it is obvious that many of the consumers will have disappeared, moved away with no forwarding address, or may have died without ever having regained the excess payments that they have made.

As long as the past procedures were in effect, there was no incentive upon the companies to get a speedy determination by the Federal Power Commission of the proposed rates.

The growing complexity of administrative procedures has opened the way to time consuming maneuvers which both the Federal Power Commission and the various states and municipalities which are representative of the consumers have so far been powerless to combat. The proceedings become more and more reminiscent of Dickens' legendary case of *Jarndyce v. Jarndyce*.

As long as there is no incentive on the part of the company desiring the new rate to speed up the procedure, there appears to be little hope that any alteration in procedure will occur.

The companies already have one advantage that in case a reduction in rates is sought, a proceeding under 5(a) must be initiated, and all sums collected during the course of these proceedings, which may be long protracted, belong to the companies, and the reduced rate will operate only prospectively. For example, in the famous *Phillips* case, in which proceedings were instituted by the Federal Power

Commission on its own motion on October 28, 1948, the proceedings have not been concluded to this day, 10 years later. Meanwhile, the initial 1945 contract rate from Phillips to Michigan-Wisconsin, which was 5 cents per Mcf has been increased to an effective 1958 rate of 11 cents per Mcf.

Meanwhile, the Michigan-Wisconsin Pipe Line Company, which until recently secured all of its gas from Phillips, has filed for three successive rate increases since 1955, seeking a total increase from the Commission fixed rate on January 25, 1955 of 31.6 cents, to a filed price on March 1, 1957 of 37.5 cents per Mcf. None of these proceedings has been completed. In order to give something resembling an even break to the consumer, the consumer should be placed on a par with the gas companies by a rule of law that declares that if reductions are only prospective after a sec. 5(a) proceeding, then increases in rates can only be prospective after a sec. 5(a) proceeding.

It was obviously the intention of Congress in an act passed for the protection of consumers to enact a regulatory scheme that put them on equal footing.

## **II. A DOCUMENT OF AGREEMENT WHICH PURPORTS TO ALLOW ONE PARTY THERETO UNILATERALLY TO FIX THE PRICE OF PAYMENT IS NO CONTRACT**

While the briefs for petitioners are replete with references to the present mode of doing business as having its basis in "service agreement" on the one hand, and "rate schedules" or "tariffs" on file on the other, and infer, while they do not so state, that these two documents or series of documents taken together do not constitute a contract with-

in the meaning of *Mobile*, we respectfully submit that it is elementary contract law that they do, taken together, constitute a complete "contract," and will not discuss this matter further.

Thereafter, they argue that under their "contract," the parties thereto intended that a unilateral rate filing could be made under sec. 4 which would go into effect under bond 5 months after suspension by the Federal Power Commission.

The single sentence in their service agreement to which they are able to point is the repeatedly quoted paragraph: "All gas delivered hereunder shall be paid for by buyer under Seller's Rate Schedule [designated], or any effective superseding rate schedules, on file with the Federal Power Commission."

We suggest that there are two things wrong with the argument. In the first place, their strained construction is not the normal construction of the language and disregards entirely the word "effective." While if only the vendor and vendee of gas, together with their regulating agency, were concerned, the court might consider their subjective statements as evidence of the intention of this language, they entirely overlook the fact that the consumer is, in effect, a party to every contract which affects the gas which he will purchase. The consumer and a representative of the consumer are entitled to look upon the agreements filed with the Federal Power Commission as subject to their normal and reasonable interpretation. They are not to be confronted, years after the fact, with some entirely different interpretation, based upon the alleged subjective latter-day statement of intention of the persons who signed the con-

tract, and which is highly beneficial to both of those parties, but highly detrimental to the consumer. On this point we simply suggest that the only interpretation that can be given to the word "effective" in the phrase "effective superseding rate schedule" is to describe a rate which has been legally approved in accordance with the statutes by the Federal Power Commission, and which is a rate entered in a 5(a) proceeding, or a rate established by the review of a specifically agreed to rate under sec. 4(e). The petitioner's present contention is obviously an after thought in an attempt to avoid the effect of *Mobile*.

In the second place, if this language were to be given the construction for which the vendor and vendee of gas contend, then the document is no contract at all and is ineffective for any purpose.

The argument that a document of alleged agreement purporting that a vendor may make unilateral price increases is a valid contract is found principally in the brief of *United*, *Argument III*, pages 41, *et seq.* While they have cited many cases in support of their proposition, none of the cases so cited, properly interpreted, support the argument.

Petitioner *United* correctly states at the top of page 43:

"The cases which enforce a contract determining a price by an external standard are numerous."

In practically all of the cases cited the contract provided for a genuine external standard whereby either party, or even an outside party, without references to the whim of either of the signatory parties, could determine the price due on any given date. A leading case on this point is the

*Outlet Embroidery Company v. Derwent Mills*, 254 N. Y. 79, cited at page 42 of petitioner *United's* brief, to which opinion we commend the attention of the court.

The correct rule has been stated in one of many texts as:

"A sales contract lacks mutuality and is unenforceable if the price of the goods to be delivered in the future is conditioned on the wish or will of one of the parties." 77 C. J. S., p. 610, sec. 20; p. 623, sec. 21.

Further, in *Williston on Sales*, sec. 168, *Executory Contracts to Sell*, it is stated:

"The price may be fixed by reference to some method of calculation that will make it certain but, unlike the situation where the property and the goods has passed, the transaction is void if no price is agreed upon or if the method will fix no certain amount unless the interpretation is possible that sale is for a fair price."

In *Weston Paper Manufacturing Co. v. Downing Box Co.*, (1923) 293 Fed. 725, the court construed a contract which contained a provision that the "price shall be fixed by the seller" three months in advance. The court held that contract which leaves the price to be fixed by the seller is so indefinite and void and rejected the seller's contention that it is like a definitely ascertainable "market price." The court definitely held that a price to be fixed by the seller is not a price to be fixed by an external standard.

In the case of *Taller and Cooper v. Illuminating Electric Co.*, (1949) 172 Fed. 2d 625, the court considered a contract for the sale of some 8,500 electric irons at \$5.17 per iron. The contract contained a clause:

"Prices shall be shown as shown in company's price list—prices and discounts are subject to change without notice."

The court held that this was a contract for sale at a \$5.17 fixed price, and that if it wasn't a contract at that price, it was void. The court stated:

"The contract for the future delivery of personal property is void for want of mutuality if the price is conditioned entirely on the will of one of the parties."

The following decisions are to the same effect:

*Cold Blast Transportation Co. v. Kansas City Bolt & Nut Co.*, 114 Fed. 77, 81;

*Nebraska Aircraft Corp. v. Varney*, 282 Fed. 608, 610;

*Brooks and Federal Surety Co.*, 24 Fed. 2d 884;

*Washington Candy Co. v. Canterbury Candymakers*, 138 Pac. 2d 195.

Two cases that contain difficult language that would appear to contradict the foregoing are the cases of *Ken-Rad Corporation v. R. C. Bohannon, Inc.*, (C. A. 6, 1935) 80 Fed. 2d 251, and *Buggs v. Ford Motor Co.*, (C. A. 7, 1940) 113 Fed. 2d 618. A consideration of the facts in the *Buggs v. Ford* case, *supra*, will show how little weight can be given to any statements contained therein. In this case, Buggs was suing for a wrongful cancellation of his dealership, and supported his claim for damages on the ground of no contract; he alleged the purported contract was void for lack of mutuality. The basis of his cause of action under such circumstances does not appear in the opinion. Under the

terms of the contract no prices were set, Ford was not committed to sell anything, but the purported contract did have the right of cancellation. In this court case the court held that there was a contract, but that Ford could cancel under the terms of the contract.

What the court should have said about the facts of Ford was: "It is quite manifest that the contract merely furnished a basis for future dealings to be observed no longer than was mutually satisfactory." *Huffman v. Paige Detroit Motor Car Co.*, (1919) 262 F. 116. See also, *Ford Motor Co. v. Kirkmyer Motor Co.*, (1933) 65 F. 2d 1001.

On this point we respectfully submit that the vast majority of the cases, of the text writers support the rule that while a contract where a future price is to be set by an external and determinable fact is valid, a contract where the price is to be set by the whim of the vendor is no contract at all.

If the petitioners are correct that the sentence on which they rely gives them the right to raise and collect the prices for their gas at their own whim, without the consent of the Federal Power Commission, and without the acquiescence of the purchaser, then the alleged contract is no contract at all.

### III. THE NATURAL GAS COMPANIES CAN GROW AND PROSPER UNDER A RULE OF LAW WHICH REQUIRES THEM TO JUSTIFY ANY RATE INCREASE IN ADVANCE OF COLLECTION

The argument is advanced, principally by one of the petitioners, that a rule requiring a natural gas company to establish a justification for a rate before the Federal Power Commission before that rate went into effect would be disastrous to the industry and would have prevented the tremendous growth and expansion that the natural gas industry has enjoyed since the termination of World War II. We find no factual evidence or analysis of the operation of companies in states which require them to justify their rates in advance which would support this argument.

It has already been pointed out to this court in the brief opposing certiorari submitted by the respondents herein, that Chairman Kuykendall of the Federal Power Commission expressed directly contrary sentiments in an address delivered to the New York Society of Security Analysts in New York on January 3, 1958. We respectfully submit our complete concurrence with Chairman Kuykendall's belief that if only sec. 5(a) proceedings could be used, that rate proceedings under that section could be processed in a much shorter time than was ever thought possible.

Moreover, we respectfully submit that in our own state, which requires rates to be justified prospectively, our telephone, gas and electric utilities have shown a marked growth in their ability to supply customers and in their income in the decade 1947-1957. While expanding their capital investments substantially, increasing their net income, they have at all times, with the exception of the first two

or three years of the decade, received a rate of return on their plant in service which is considered fair and equitable by all utility regulation standards, and which obviously has been sufficient to attract the capital to finance the expansion of physical plant necessary to satisfy consumer needs.

During the decade 1947-1957, our four largest telephone companies, which did 93 per cent of our business, responsive to consumer demand, increased their plant in service by almost 300 per cent.

During the same period, our seven largest gas companies, which did 94 per cent of our total gas business, increased their plant in service by more than 150 per cent.

During the same period our seven largest electric utilities which did 89 per cent of our total electric business increased their plant in service by 100 per cent.

During this time, with the tremendous growth and maintenance of prosperity of the telephone, gas and electric utilities, the consumer has at all times been receiving protection from a vigilant Public Service Commission under a procedure that requires that any request for a rate increase be justified before that rate increase be placed into effect. And, we may add, during this decade no rate increases have been adopted under the emergency procedure referred to by counsel for the Federal Power Commission at page 95 of the Federal Power Commission brief.

We respectfully submit to the court our sincere belief that all the significant figures which would determine whether a natural gas company under the jurisdiction of the Federal Power Commission were in such serious finan-

cial difficulties that it needed an immediate rate increase, could be taken from the previous year's form number FP-11's and analyzed on a single sheet of accounting paper, which is a job that could be done in three days rather than three years. Too often the rate proceedings degenerate into wrangles over technical accounting issues verging on the esoteric inspired by the same motive that inspired William The Conqueror, when he prepared that first giant assessment roll known as the "Domesday Book," and that is, "to see whether more can be had."

Justice to the consumer, which is at the same time in no way unfair to the company, demands that the practice of placing rate increases in effect unilaterally against existing customers cease.

### CONCLUSION

For the foregoing reasons, we respectfully submit that the decision of the Court of Appeals for the District of Columbia herein should be affirmed.

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**CERTIFICATE OF SERVICE**

Roy G. Tulane, one of the attorneys for *amicus curiae*, and a member of the Bar of the Supreme Court of the United States, does hereby certify that he has served upon the Solicitor General of the United States, an Attorney of Record for the Federal Power Commission and upon Counsel of Record for each other party, a copy of the foregoing Brief Amicus Curiae in support of the position of respondents by depositing true and correct copies thereof in the United States mail, first class postage prepaid on September 29, 1958 addressed as follows:

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**IN THE**  
**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1958.**

**Nos. 23, 25 and 26.**

**FEDERAL POWER COMMISSION ET AL.,**  
*Petitioners,*

*vs.*

**MEMPHIS, LIGHT, GAS AND WATER DIVISION ET AL.,**  
*Respondents.*

**BRIEF OF CITY OF HATTIESBURG, MISSISSIPPI,  
AMICUS CURIAE ON THE SIDE OF RESPONDENTS.**

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**IN THE  
SUPREME COURT OF THE UNITED STATES**

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**OCTOBER TERM, 1958.**

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**Nos. 23, 25 and 26.**

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**FEDERAL POWER COMMISSION ET AL.,  
*Petitioners,***

**VS.**

**MEMPHIS, LIGHT, GAS AND WATER DIVISION ET AL.,  
*Respondents.***

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**BRIEF OF CITY OF HATTIESBURG, MISSISSIPPI,  
AMICUS CURIAE ON THE SIDE OF RESPONDENTS.**

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**REASONS FOR FILING THIS BRIEF.**

This brief is filed in support of Respondents pursuant to Rule 42(4) of the Rules of this Court. The Order of the Federal Power Commission which was reversed by the Court below not only refused to reject rate increase filings by United Gas Pipe Line Company applicable to Respondents, but also refused to reject rate increase filings by United applicable to Willmut Gas & Oil Company. Will-

mut, as did Respondents, filed a Petition for Review of the Commission's order with the Court below. On December 26, 1957, the Court below reversed the Commission's order as to Willmut on the authority of its holding here under review. *Willmut Gas & Oil Co. v. Federal Power Commission*, 251 F.2d 381. Subsequently, on February 26, 1958, the Court stayed the issuance of its mandate in the Willmut Case pending disposition of this case by this Court.

Willmut Gas & Oil Company is a public utility authorized to distribute natural gas in Hattiesburg, Mississippi. It buys all of the gas it so distributes from United Gas Pipe Line Company. Any rate increase by United to Willmut will directly affect the price of gas to the residents of Hattiesburg. Hattiesburg therefore files this Brief as *parens patriae* for and on behalf of its inhabitants.

Hattiesburg, a municipal corporation, through its chief law officer, files this brief pursuant to Rule 42(4), on behalf of itself and the consumers of natural gas within its limits, for whose welfare the City is responsible, herein called the "City". Being an ultimate consumer and responsible as a governmental agency for the consumers within its territory, it may complain of any violation of the Natural Gas Act (Title 15, U.S.C.A., Sec. 717 *et seq.*) (Act) when its vested rights are being infringed by the unlawful conduct of United Gas Pipe Line Company (United), a natural gas company. *Federal Power Commission v. Interstate Natural Gas Co.*, 336 U.S. 577, 93 L.ed. 895; *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 98 L.ed. 1035; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 88 L.ed. 333; *Natural Gas Pipeline Co. v. Federal Power Commission*, C.A. 3, 253 F.2d 3; and *Public Service Com. of New York v. Federal Power Commission*, C.A. 3, No. 12,401, decided June 30, 1958.

In these causes, City is interested precisely as are Memphis, Tennessee, and Jackson, Mississippi, save that it obtains its gas for municipal purposes and for the benefit of its citizens through Willmut Gas & Oil Company (Willmut), which has an exclusive requirements contract with United, expiring August 1, 1962. See "Annotation", 26 A.L.R. 2d 1139.

As to the four advances assumed to be made by United in Docket Nos. G-9547, G-10,592, G-12,801 and G-15,360, as reduced in the Jackson Zone on June 16, 1958, the City asserts the same rights as asserted by the respondents in the above causes. Willmut, before the Federal Power Commission (Commission), pursued precisely the same course as did Memphis and Willmut's motion to strike was by the Commission overruled. Therefrom appeal was had and the Court of Appeals for the District of Columbia, in Cause No. 13,683, reversed the Commission. Therein, *inter alia*, it was said, *Willmut Gas & Oil Co. v. Federal Power Commission*, C.A., D.C., 251 F.2d 381, 382:

"\* \* \* the order of the Commission will be set aside and relief granted along the lines stated in Memphis. Additional contentions made by the petitioner need not be reached."

The Court of Appeals is withholding mandate until determination of this cause.

### **PRELIMINARY REMARKS.**

A. Primarily, these proceedings are judicial—*inter partes*—and affect only the parties to the litigation. Improperly, United has sought herein not a judicial determination of a question of contract law, but *per contra* a legislative adjustment of the inter-relations of all parties in the

natural gas industry, which more appropriately should have been sought in Congress. If this Court will construe this particular contract between these particular parties, it will have fully discharged its duty. In *Woodruff v. State*, 66 Miss. 298, 6 So. 235, 162 U.S. 291, 40 L.ed. 973, this Court had thrice argued whether a Mississippi contract to pay, as was claimed, in gold coin violated Federal rights, but the difficulty was avoided until many years thereafter when Mr. Chief Justice Fuller simply construed the contract to be solvable in dollars and thereby made all of this learning inapposite.

B. The Commission as well as United failed to integrate certain factors which render the conclusion a clear *non sequitur*, namely:

United's total gas sales for 1957, test year, aggregated 1,232,680,785 Mcf; of this 481,019,797 Mcf was jurisdictional and 751,660,988 was non-jurisdictional; so that as to more than 50% of its sales United might contract as it saw fit and impliedly the party of the other part might do likewise. Mr. Justice Harlan commented in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 100 L.ed. 373, 383:

"In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts. \* \* \*"

When the dollar value is utilized, it is found that the total receipts for United in 1957 aggregate \$220,322,315 and that the jurisdictional aggregated only \$91,517,251, or roughly 58-1/2% non-jurisdictional and 41-1/2% jurisdictional. How and why those who were beyond the jurisdiction

could thus validly contract while those subordinate to the jurisdiction were to be thereastoinhibited, does not accord with equality. The dire predictions of financial ruin is not predicable upon such a minority factor especially under the reasoning of *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 88 L.ed. 333, 349:

"\* \* \* Moreover, the investigations of the Federal Trade Commission had disclosed that the majority of the pipe-line mileage in the country used to transport natural gas, together with an increasing percentage of the natural gas supply for pipe-line transportation, had been acquired by a handful of holding companies. State commissions, *independent producers, and communities having or seeking the service were growing quite helpless against those combinations.* These were the types of problems with which those participating in the hearings were preoccupied. Congress addressed itself to those specific evils." (*Italics ours, unless otherwise noted*).

We advert to the vast learning in the opinion of Mr. Justice Jackson and the consequences that he points out as to the destruction of this natural resource. With deference, this effort upon the part of the companies to allow the premature exhaustion of the natural gas supply ought not to find favor as against respondents. *Pennsylvania v. West Virginia*, 262 U.S. 553, 67 L.ed. 1117, dissenting opinions Mr. Justice Holmes and Mr. Justice Brandeis. Furthermore, those needing the greatest protection are those who are substantially without power to resist as are those for whom this brief is filed. As against them, flexibility in express contracts should not be allowed when they are helpless thereasagainst, especially when the action disturbs the State-National equilibrium. *Detroit v. Murray Corporation*, \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_, 2 L.ed. 2d 436, 460; *United States v. Western P. R. Co.*, 352 U.S. 59, 1 L.ed. 2d 126. Compare,

as to the independent rights of the City and the consumers, *Independent Linen Service Co. v. Stone*, 192 Miss. 832, 6 So. 2d 110. In *Public Service Commission of New York v. Federal Power Commission*, C.A. 3, No. 12,401, decided June 30, 1958, it was said:

"Tennessee Gas, CATCO, and the Commission argue that the petitioners have no standing to ask this court to review the order of June 24, 1957, because they are not 'aggrieved' as required by Section 19(b) of the Act. Essentially, the petitioners represent the ultimate consumers of the gas. In *Natural Gas Pipeline Company of America v. Federal Power Commission*, 253 F. 2d 3 (C.A. 3, 1958), cert. pending, we held that a gas transmission company which has passed its increases on to its customers is 'aggrieved', since as a matter of ethics and good business, it is required to protect its customers. \* \* \*"

C. Counsel vouchsafes the truthfulness of that assumed in behalf of the City and which may be verified from the record in this Court, No. 1021, October Term, 1957, *Willmut Gas & Oil Co. v. United Gas Pipe Line Co.*, U.S. —, 2 L.ed. 2d 1350, certiorari denied June 30, 1958, — Miss. —, 97 So. 2d 530; the record in the Court of Appeals of the District of Columbia, No. 13,683, *Willmut Gas & Oil Co. v. Federal Power Commission*, 251 F. 2d 381; *Willmut Gas & Oil Co. v. United Gas Pipe Line Co.*, Docket No. G-1158, 99 P.U.R. N.S. 65; General Rate Investigation, *United Gas Pipe Line Company*, Docket No. G-1142, Opinion No. 277.

In presentation of its case, it is respectfully submitted that this Court, in order to make a correct determination of the vital questions here of contract construction, is asked to assume as capable of proof those things hereinto integrated so as to give the requisite light upon the questions

of law. All facts thus assumed to be stated may be found in the causes above listed.

D. The City's case has idiosyncrasies effectually requiring individual treatment. There are peculiar facts requisite to an understanding and decision of this case where-through the City's rights will be in part preserved, *Willmut Gas & Oil Co. v. United Gas Pipe Line Co., C.A., D.C.*, 251 F. 2d 381.

Hattiesburg is a Mississippi municipal corporation, with appropriate statutory powers, located in Forrest County. It has more than 50,000 people and its municipal needs as well as those of its citizens are solely dependent upon Willmut for gas—a vital necessity. It has a large industrial operation, Hercules Powder Company, which consumes almost 50% of the gas of Willmut for industrial purposes. Willmut is strictly a locally owned corporation and wholly unaffiliated.

About 1930, the Public Service Corporation of Mississippi constructed a pipe line from the then Jackson, Mississippi, Gas Field to Hattiesburg with a local distribution system within the City. Thus to do, the City granted mediately to Willmut a municipal franchise, wherein it was expressly provided:

"Section 4. The grantee, herein, its successors, lessees, and assigns, hereby obligate and bind themselves to and with the City of Hattiesburg to furnish natural gas to said City for the purposes set forth in this franchise from the natural gas fields of the City of Jackson within a radius of ten miles of the old Capitol Building in Jackson for the life of this franchise at prices and quantities set forth in the schedule of prices in Section 3 of this franchise.

"If, during the life of this franchise, natural gas should be discovered in commercial quantities within

a radius of forty miles of the Court House of the City of Hattiesburg, then the grantee, its successors and assigns, obligate and bind themselves to and with the City of Hattiesburg to take from said new field a portion of gas as required under this franchise and shall reduce the rate fixed in this franchise proportionately to the resultant saving to the grantee. If, during the life of this franchise, natural gas should cease to be obtainable in commercial quantities in the Jackson field, as defined herein, so that the grantee could not comply with the foregoing requirements of this franchise, and natural gas should be produced in sufficient commercial quantities in other fields nearer the City of Hattiesburg to enable the grantee to comply with the requirements of this franchise, then such gas shall be furnished said City proportionately to the resultant saving to the grantee.

"If natural gas should cease to be obtainable in commercial quantities in the Jackson gas fields and should not be produced in commercial quantities in gas fields nearer Hattiesburg than the Jackson gas fields, then the grantee shall furnish natural gas to the City of Hattiesburg from any gas fields in the State of Mississippi further from Hattiesburg than the Jackson fields at a rate to be fixed by the Mayor and Board of Commissioners of the City of Hattiesburg proportionately to the resultant increased cost to the grantee. In the event natural gas should cease to be obtainable in sufficient commercial quantities in the State of Mississippi to enable the grantee to comply with this franchise, then the grantee shall obtain such gas from any source available and supply it to the City of Hattiesburg and a reasonable rate for such gas shall be fixed by the Mayor and Board of Commissioners of the City of Hattiesburg, Mississippi."

About 1940, United had constructed to Jackson an 18" interstate pipe line and connected it with the Jackson-Mobile pipe line which paralleled the Willmut line. United

had actively opposed the construction of this 8" line. When, in 1940, the gas supply at Jackson was depleted, United refused to make available any of its interstate gas to Hattiesburg through its Willmut line. In extreme weather, with acute gas shortage, Willmut, without United's consent, made a physical connection at Jackson and thus relieved those in dire need of gas. Later, United had rates retroactively made effective for gas thus received, but compelled Willmut to transport gas 90 miles in its line to this City, compelling it to stand transmission losses when it could have made city gate delivery as was done to other municipalities.

The City first became connected with this litigation when it appeared in *Willmut Gas & Oil Company v. United Gas Pipe Line Co.*, Docket No. G-1158, 99 P.U.R. N.S. 65, Appendix "A", opinions of Commission and Examiner. United, upon July 26, 1947, as to domestic gas, assumed to grant to the distributing company at Jackson and surrounding small towns a rate of 17.5¢ per Mcf on gas transmitted into Mississippi in its interstate pipe line, while charging at Hattiesburg 25¢ per Mcf for gas which United originated at Gwinville within 40 miles of Hattiesburg and transported to city gate where it made delivery. United, as shown by Docket No. G-1158, contended that it had so rearranged its distribution system in Mississippi as that City was receiving exclusively intrastate gas.

When the Jackson Gas Field failed, United or its affiliates appropriated approximately 30% of Willmut's gross.

In 1943, the gas price was reduced to 25¢ per Mcf, Docket No. G-148. Thereafter, United purchased the pipe line under order of the Commission, Docket No. G-478, leaving Willmut in possession of the distribution systems,

including Hattiesburg. United at that time required Willmut to make a contract for twenty years for all its gas requirements, said contract having been filed as F.P.C. Rate Schedule No. 73. Willmut in that contract, which appears as Appendix "B", specifically contracted:

"A. For all gas delivered by Seller to Buyer for resale and distribution to Buyer's domestic consumers, twenty-five cents (25¢) per thousand (1,000) cubic feet.

\* \* \*

"The price to be paid by Buyer to Seller for each one thousand (1,000) cubic feet of gas sold and delivered to Buyer hereunder during each succeeding five (5) year period of this agreement, after July 25, 1947, shall be determined by agreement between the parties not less than twelve (12) months prior to the beginning of each of such five (5) year periods and failing so to agree the determination of the price shall be submitted to arbitration as hereinafter in this Section VII provided."

There were elaborate provisions for arbitration. Compare *Hamilton v. Liverpool & L. & G. Ins. Co.*, 136 U.S. 242, 34 L.ed. 419; *Home Ins. Co. v. Watts*, \_\_\_\_ Miss. \_\_\_\_, 91 So. 2d 722; *M. T. Reed Const. Co. v. Virginia Metal Products Corp.*, C.A.5, 213 F. 2d 337; and *Memphis Light, Gas & Water Div. v. Federal Power Commission*, C.A., D.C., 250 F. 2d 402.

This form of contract then executed, fixing these provisions/excluding the necessity of action by the Commission, originated with counsel for Willmut to exclude the possibility of a prior unfortunate experience. When Willmut's counsel was acting on behalf of the Central Yellow Pine Association, the difficulties and expenses incident were such as that more than seven years in time was consumed in the administrative fixation of a railroad

rate, the health of certain clients seriously impaired, with the result that the demand was subsequently settled. A segment of that South-wide litigation reached this Court in *Illinois Central R. Co. v. Interstate Commerce Commission*, 206 U.S. 441, 51 L.ed. 1128.

United, notwithstanding these elaborate provisions and their validity, in making a unilateral change, declared in a letter to Willmut thus:

"\* \* \* Accordingly, we intend to continue in effect during said 5-year period beginning July 25, 1947, for all gas sold and delivered thereunder, the same price that is in effect on July 24, 1947."

United claimed the City's mediate rights to arbitration to be without effect; and also claimed that it was not obligated as a public utility, but might render service to those of its own choosing.

Where, at East Jackson, Mississippi Power & Light Company was on one side of the street paying 17.5¢ per Mcf and Willmut on the other paying 25¢ per Mcf and the gas unquestionably interstate, United offered to give the same rate if Willmut would forego on behalf of the City the equality demanded. At that time, the Commission had under consideration United's rates, a general rate investigation, Docket No. G-1142. Therewith, Docket No. G-1158 was for a time consolidated, both the City and Willmut being unable financially to challenge the rate structure, but both attacked on the ground that the rates were (1) unjust and unreasonable, and (2) discriminatory. After years, the Commission separated Docket No. G-1158 and a hearing was had, whereat the Commission adjudged that United's attempt to oust the jurisdiction of the Commission over the system was unlawful and that the City had not made such a showing as to the justness and reasonable-

ness of the rate as to warrant relief, but that on the basis of discrimination, it had proved its case, saying as to United, Op. p. 18:

"After careful consideration of the entire record, we find no reason to depart from the Examiner's finding that, by its failure without lawful justification to make natural gas available to Willmut at the same rates or charges voluntarily established and made available to MVG and its predecessor, MPL, United is unlawfully subjecting Willmut to undue prejudice and disadvantage; and unlawfully granting undue preference and advantage to MVG; and that such practices by United are unjust, unreasonable, unduly discriminatory and preferential, and unlawful, in violation of the provisions of the Act. The evidence *conclusively demonstrates* that United is unduly discriminating against Willmut by charging MPL (now MVG) a rate of 17.5¢ per Mcf for domestic gas under its Rate Schedule FPC No. 95 while at the same time exacting a 25¢ rate for such gas from Willmut under its Rate Schedule FPC No. 73."

In fact, the Examiner, in his report, went one step further and declared:

"There appears to be no escape from the conclusion that the treatment which Willmut has received at the hands of United is nothing more than an attempted squeeze play designed either to force Willmut out of the retail gas business, or to cause it to maintain a high level of retail rates so as to furnish justification for the maintenance of United's parent corporation, United Gas Corporation, of its level of rates in adjacent areas in the Jackson rate zone, as well as to cause other customers of United in that area to maintain their level of rates."

This, however, was not accepted by the Commission.

The Examiner, whose findings were approved by the Commission in this aspect, said, Op. p. 8:

"Severance of the complaint proceeding from the Commission's general rate investigation of United, together with the absence of a cost of service study, necessarily narrows the complaint to a 'discrimination case' as distinguished from a 'rate case', \* \* \*."

Willmut and the City simply did not have the facilities or the available revenue to have, in Docket G-1158, an adjudication as to what was *per se* a just and reasonable rate. Even though the discrimination was bald and patent, still United sought to divest these rights, but thereunto the Examiner said, Op. pp. 40-41:

"As is made clear in the foregoing ruling in the Otter Tail Power Company case, there is abundant reason for rejecting the contention that a *complete rate case must be conducted before 'patent, discrimination' can be removed by order of the Commission*. Acceptance of this contention would mean, insofar as this case is concerned, that the Commission *must undertake and complete a cost study of one of the largest, if not the largest, natural gas companies in the United States*, whose operations cover five states, before it could order the elimination of existing discrimination between two retail distributors in Mississippi. Such a cost study is what the Commission initiated by its order dated October 12, 1948, in Docket No. G-1142 (p. 7, *supra*) and is currently under way, and is, of course, a tremendous undertaking and can be made even more burdensome and time-consuming by reason of (1) litigation such as United has instituted (see *United Gas Pipe Line Co. v. Federal Power Commission*, 181 F. 2d 796, cert. den. 340 U.S. 827; also Civil Action 4680-50 now pending in the District Court of the United States for the District of Columbia), and (2) the refusal of an affiliate of United (Union Producing Company) to make readily available upon request pertinent cost and other data required by members of the Commission's staff in connection with their field investigation of the cost of rendering service (see orders of the

Commission entered August 22, 1952 and October 9, 1952, In the Matter of United Gas Pipe Line Co., Docket Nos. G-1142 and G-2019). Surely it was not the intent of the Congress to permit the Commission's hands to be tied in any such manner before it could afford relief to a *comparatively small retail distributor such as Willmut.*

"In conclusion it is not inappropriate to say that it would be difficult to conceive of a case in which the Commission could more appropriately exercise its regulatory authority than in the case at bar. For to allow United to trifle with the Commission's jurisdiction in the manner attempted is to (1) permit it to circumvent the statutory scheme of regulation with the result that 'the basic purpose of the Natural Gas Act fails of realization' (Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co., *supra*, 173 F. 2d at p. 789), and (2) ignore the rights of *ultimate consumers* whom the Act was designed to protect (Federal Power Commission v. Interstate Gas Co., 336 U.S. 577, 581). No natural-gas company may be permitted, by conduct such as is reflected in the record in this case, or by any other means, to nullify the 'primary aim' of the statute 'to protect consumers against exploitation at the hands of natural gas companies' (Federal Power Commission v. Hope Natural Gas Co., *supra*, 320 U.S. at p. 610)."

As at March 29, 1956, Mississippi asserted intrastate sovereignty, Chapter 372, *Mississippi Laws of 1956*, Secs. 7716-01, *et seq.*, *Recompiled Mississippi Code of 1942*. Its Commission has filed an *amicus* brief for respondents. At common law prior thereto the City's right to impose civil liability for the exaction of an unjust, unreasonable or discriminatory rate persisted. *Western Union Teleg. Co. v. Call Publishing Co.*, 181 U.S. 92, 46 L.ed. 765; *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 95 L.ed. 912, dissenting opinion Mr. Justice Frank-

furter; *Bell v. Kaye*, 127 Miss. 165, 89 So. 910; *Almaras v. Hattiesburg*, 181 Miss. 752, 180 So. 394. The Supreme Court conceded substantially this rule to exist in *United Gas Pipe Line Co. v. Willmut Gas & Oil Co.*, \_\_\_\_ Miss. \_\_\_\_, 97 So. 2d 530. Willmut, as the local distributing utility, could not exact an unlawful rate for gas furnished the City and was obligated to law-conformity. Especially, it could not bind the ultimate consumers to have integrated into their rate structure an unlawful exaction originating contrary to a valid contract. In *Federal Power Commission v. Interstate Natural Gas Co.*, 336 U.S. 577, 93 L.ed. 895, 901, this Court said:

“\* \* \* The aim of the Act was to protect ultimate consumers of natural gas from excessive charges. See *Federal Power Commission v. Hope Natural Gas Co.*, supra (320 U.S. at 610, 612, 88 L.ed. 349, 350, 64 S. Ct. 281). They were the intended beneficiaries of rate reductions ordered by the federal commission, though state machinery might have to be invoked to obtain lower rates at the consumer level. \* \* \*”

The City, in its governmental capacity, will not be presumed to have waived an illegality operating oppressively. The City may not make a donation by foregoing its rights without consideration. *Jackson Electric R., L. & P. Co. v. Adams*, 79 Miss. 408, 30 So. 694. There is thereast to the necessity for keeping clearly in mind the line of demarcation between State and National sovereignty, especially the purpose wherefor the Act was passed.

The investigation, Docket No. G-1142, still dragged on, and there was a conference at the suggestion of the Commission, under which there was an agreement between all of United's customers, except Mobile, Tyler and Mississippi River Fuel, that United might publish the rate agreed on under a *pro forma* settlement involving many items.

The rates which were fixed by agreement were precisely as had been in 1943. Therein, Mr. Tatum, President, assumed to say on behalf of Willmut:

"We do believe that the proposed settlement, although not acceptable in all ways to everybody, is fair in the public interest, and gentlemen, that's what counts. We believe it is your duty and my duty to look after the public interest first." (Transcript, Docket G-1142, et al., pp. 3131-2).

Note the order of the Commission entered September 11, 1958, *In the Matters of United Gas Pipe Line Company*, Docket Nos. G-1142 and G-2019, wherein United and Mississippi River Fuel Corporation, with the tacit approval of the Commission, settled Docket No. G-1142, wherein the Commission after a ten year period declared, p. 7:

"Further, it is in the public interest that these proceedings come to an end. One of them is nearly ten years old; the other, nearly six. The Supreme Court long ago has said that there must be an end to controversy. *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151, 175. We think that this is a sound rule and one that we should follow in the circumstances."

Thus, by consent, Docket No. G-1142 was terminated.

The City desires to plant itself unequivocally and firmly upon that provision of the Act which declares, Section 4(a):

"All rates and charges made, demanded, or received of any natural-gas company \* \* \* shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful."

But especially observe that said by Mr. Justice Frankfurter in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 95 L.ed. 912, 922.

Under the decision of the Supreme Court of Mississippi (*United Gas Pipe Line Co. v. Willmut Gas & Oil Co., supra*), the City was unlawfully deprived of approximately \$1,500,000, that being the estimated excess of published rate over a just, reasonable and non-discriminatory rate. If, on behalf of itself and its citizens, it can in any wise secure a refund of that unlawfully exacted, it desires thus to do and feels itself so obligated, as well as to have vacated the advances assumed to be made by United in flagrant violation of its rights and the rights of its citizens.

The other facts are similar to those in the Memphis records; and the argument of counsel for respondents is accepted, save when and to the extent that it conflicts with that herein said.

The City is grateful to the Commission for the relief granted it and its citizens in Docket No. G-1158 and does not in any wise assume to be critical of the Commission in the contentions made, save to the extent that, with deference, the same are inaccurate as to the law.

Applicable sections of the *United States Constitution* and the Natural Gas Act are Appendix "C" hereto.

### POINT I.

The provision in Willmut's contracts with United providing for the payment of gas under specifically designated rate schedules or "any effective superseding rate schedules on file with the Federal Power Commission" cannot be interpreted to permit United to change its rates simply by filing new rates under Section 4 of the Natural Gas Act. This provision only authorizes United to effect by appropriate filings such rate changes as the Commission, acting pursuant to Section 5 of the Act, orders.

It is to be emphasized that this provision is part of United's so-called standard service agreement. The stand-

ard service agreement was designed and filed in compliance with the Commission's Order No. 144, which is now Section 154.81 *et seq.* of the Commission's Regulations under the Natural Gas Act. The purpose of these regulations was to achieve gradually uniformity in the terms and conditions of service to the various classes of sales. They therefore provided, Section 154.85, that existing contracts for service would be replaced upon their expiration, or earlier if the parties agreed, by standard service agreements in a form contained in the tariff and approved by the Commission.

The Commission's Order No. 144 was not designed to effect substantive changes in the rights and obligations of natural gas companies and their customers as established in their existing contracts. The Commission itself so stated and the Court below so held in *United Gas Pipe Line Company v. Federal Power Commission*, 86 U.S. App. D.C. 314, 181 F.2d 605. It follows that United's and Willmut's substantive rights under their standard service agreements are neither greater nor less than those they had under the contract that the standard service agreements replaced. That contract was entered into between Willmut and United on August 20, 1943 and filed with the Commission as United's FPC Gas Rate Schedule No. 73. It provided for the delivery of gas to Willmut until July 25, 1962 at rates which could be changed by mutual agreement between United and Willmut or, failing such agreement, by arbitration, as set forth in Section 7 of the contract. It did not permit United to change rates unilaterally, without the consent of Willmut, by filing changes pursuant to Section 4 of the Natural Gas Act.

The rates fixed in the 1943 contract by agreement or by arbitration were of course subject to what this Court in the *Mobile Case* called the "paramount power of the Commission" under Section 5 of the Natural Gas Act. *Fed-*

*eral Power Commission v. Mobile Gas Service Corporation*, 350 U.S. at p. 344. Indeed, the Commission exercised that power respecting them when, in Docket No. G-1158, upon the complaint of Willmut, it required United to reduce them. However, it is one thing to say that the Commission may modify rates upon a finding that they are unjust, unreasonable, unduly discriminatory or otherwise unlawful. It is quite another thing to say that United may modify rates by simply filing new rates and, if required by the Commission to do so, showing that those rates are within the "zone of reasonableness" and therefore not unlawful under Section 4(a) of the Natural Gas Act.

It would indeed take clear language in the standard service agreement that replaced the 1943 contract between Willmut and United to find that Willmut had ceded to United the right to modify rates at will at any time during the life of the contract—to find in short, that Willmut bound itself to buy its entire requirements of gas until 1962 at whatever price United might choose to fix and be able to sustain under whatever criteria for lawfulness might be in vogue with the Commission at the time. That the language in the standard service agreement upon which the Commission relies gives United no such right can be demonstrated. The Commission's Order No. 144 required the filing of tariffs and standard service agreements "in accordance with §§ 154.31 through 154.41" of the Commission's general regulations governing tariffs and sales agreements. Subsection (d)(3) of Section 154.38 thereof provides that:

"\* \* \* a natural-gas company may state in the service agreement \* \* \* that it is or will be its privilege \* \* \* to propose to the Commission a modification, change or substitution of the then effective rate or charge: Provided further, That no such clause may effectuate a change in an effective rate or charge ex-

cept in the manner provided in section 4 of the Natural Gas Act, as amended, and the regulations in this part." (Emphasis supplied in part).

United's first filing in purported compliance with Rules 154.81 through 154.85 was made on May 29, 1952, to be effective July 1, 1952. The standard service agreement then filed reserved to United just such a privilege. Article V, fixing rates, provided that: —

"All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule \* \* \*, or any effective superseding rate schedules, on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached thereto and filed with the Federal Power Commission which are by reference made a part hereof.

"The rates established by Seller are designed to reflect Seller's cost of rendering service and to provide a fair rate of return to Seller. In the event of an increase in Seller's cost, or of any change which would result in the rates of the Seller providing less than a fair rate of return, Seller shall have the right to revise its rates to reflect such change. Such revised rates shall be charged only after they have been filed with the Federal Power Commission and become effective in accordance with its rules and regulations."

This provision never became effective and was withdrawn. The price provision in the standard service agreement that was actually made effective contains no language similar or equivalent to the second paragraph quoted immediately above. It is submitted that the withdrawal of this provision clearly shows that both the Commission and United recognized that the latter's 1943 contract with Willmut did not permit the unilateral filing of rate changes

under Section 4(d) of the Natural Gas Act and that it could not, therefore, properly include such a provision in the standard service agreement filed in compliance with Order No. 144 and designed to replace that contract without altering the substantive rights and obligations of the parties thereunder.

In Opinion 295 the Commission said that the provision in the standard service agreements requiring Willmut to pay for gas at the designated rate schedules "of any effective superseding rate schedules" is "meaningless and surplusage" unless it permits United to make changes in rates by simply filing new rates under Section 4 of the Act. It argued that otherwise "it can only be concluded that by such language the parties intended merely that the first effective rates would continue" until changed under Section 5 of the Act, and that this would mean that the parties were "merely agreeing to comply with the Act, and the order of the Commission thereunder", which it said they are obligated to do whether or not they have so agreed.

The fallacy of this argument is that it blandly ignores the fact that neither the Natural Gas Act nor any order the Commission might issue thereunder requires Willmut to buy any gas from United. Willmut's obligation so to do exists solely by reason of its contract with United and is limited by the terms of that contract. Were the language in the service agreements the Commission relies upon not there Willmut's only obligation would be to buy gas at the rates fixed in the rate schedules specifically designated in the service agreement. Any increase in those rates, whatever its genesis, would obviously be a material breach of contract which would justify rescission by Willmut. Thus the purpose and meaning of the language becomes clear. They are to impose upon Willmut an obli-

gation it would not otherwise have, i.e., to buy its requirements of gas from United at the rates in the designated rate schedules or whatever other rates may be fixed by the Commission pursuant to Section 5 of the Natural Gas Act. In other words the service agreements substitute proceedings under Section 5 for the arbitration provided in the 1943 contract as a means of effecting rate changes during the life of the contract. That United as well as Willmut or the Commission can effectively invoke Section 5 to secure rate changes was expressly held by the Supreme Court in the *Mobile Case*.

## POINT II.

The basic fallacy in the Commission's position is the assumption inherent in it that the *Mobile Case* did no more than circumscribe the powers of natural gas companies under the Natural Gas Act, i.e., did no more than hold that Section 4 of that Act did not authorize natural gas companies to violate their contracts. This is too narrow a view of this Court's opinion and judgment. In fact, this Court defined generally the rate making powers of natural gas companies and the rate regulatory powers of the Commission under the Natural Gas Act. It defined the rate making powers of natural gas companies as follows:

"to establish ex parte, and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer." 350 U.S. at p. 343.

It defined the Commission's rate regulatory jurisdiction as the power to review legally established existing rates. It clearly held that a natural gas company has no power to file and the Commission has no power to entertain rate proposals. Yet these are precisely the powers which the Commission now says it can exercise.

There is no doubt that United's filing in issue was a rate proposal. In the first place, both United and the Commission have consistently so treated it. The Order of Suspension issued October 26, 1955 in Docket No. 9547 speaks of the rates "proposed by United", of United's "proposed rate increase." Opinion No. 295 holds that the Natural Gas Act "reserved to the natural gas company providing the service" the right "to file a schedule of proposed changes in the seller's rates." In the second place, Willmut has clearly not agreed to the rates contained in the filing. It has intervened in the proceedings convened to determine their justness and reasonableness and has vigorously opposed them in those proceedings. It follows that, under the rule of the *Mobile Case*, United has no power to make the filing Willmut challenged. Its attempt to do so was a nullity and the Commission was bound to reject it.

In this view it is entirely immaterial whether, as the Commission held in Opinion and Order No. 295, Willmut agreed that United might make rate proposals under Section 4 of the Natural Gas Act. We have shown that this holding is incorrect in our argument under Point I of this Brief. But assuming *arguendo* that Willmut did so agree, it could not thereby enlarge the Commission's power. The Congress having withheld from the Commission regulatory jurisdiction over proposed as distinguished from existing rates, it is axiomatic that no act of United or Willmut could confer that jurisdiction. True enough, Section 154.38 of the Commission's Regulations under the Natural Gas Act purports to authorize contracts between natural gas companies and their customers which permit the filing of rate proposals under Section 4 of the Act, and the validity of that regulation has never been specifically determined. However, the *Mobile Case* necessarily, albeit

impliedly, holds it to be beyond the Commission's statutory power to enact.

The conclusion Willmut here urges is not only compelled by the square holding of this Court in the *Mobile Case*, but is compelled also by the considerations of public policy which this Court there found expressed in the Natural Gas Act:

"By preserving the integrity of contracts, [the Act] permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. Conversion by consumers, particularly industrial users, to the use of natural gas may frequently require \* \* \* long-term commitments from the distributor, and the distributor can hardly make such commitments if its supply contracts are subject to unilateral change by the natural gas company whenever its interests so dictate." 350 U.S. at p. 344.

The Commission's holding in Opinion and Order No. 295 subverts the public policy just as effectively as did its erroneous holding in the *Mobile Case*. United's filing of increased rates to Willmut was just as unilateral as was its filing of increased rates to Mobile. Willmut was not consulted about the filing when it was made and did not agree to pay the increase in rates it contained. If such a filing is allowable Willmut and the consumers who buy from it have no rate stability whatever. They are at the mercy of United from day to day. They must pay any rate it fixes, even though it be exorbitant on its face.

It is no answer that the Commission may exercise its authority under Section 4 to suspend the operation of the increased rates for domestic sales and after hearing disallow all or a portion of the increase. To begin with a large portion, 45%, of Willmut's annual volume of sales are sales to Hercules Powder Company for industrial use.

The increased rates for these sales the Commission is without power to suspend. Willmut must pay them over the months and often years during which proceedings to determine their reasonableness pend. Moreover, this Court refused to review a decision of the Supreme Court of Mississippi holding that even though all or a portion of the increase is ultimately determined to be unjust and unreasonable, Willmut is not entitled to reparations. *Willmut Gas & Oil Company v. United Gas Pipe Line Company*, 78 S. Ct. 1384, opinions below, 97 So. 2d 530; 100 So. 2d 609. See also *Montana Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 71 S. Ct. 692.

As for the increased rates for domestic sales, the Commission can suspend them for only five months. As a practical matter proceedings to determine their justness and reasonableness cannot be concluded within that period. Willmut must therefore pay them and either absorb the increase or pass it on to its consumers for a period of months or years. The result may well be irreparable damage to it and its consumers.

Finally, it is to be emphasized that in any given situation, or any given state of facts, there is a substantial spread between the lowest and the highest just and reasonable rate. The effect of the Commission's holding in Opinion and Order No. 295 is to require Willmut always to pay the highest. United can be counted upon to seek the highest in any filing it makes under Section 4 of the Natural Gas Act, and, under that Section, the Commission concerns itself only with what it calls the "proposed", not with the existing rates. Thus, it cannot compel adherence to the lower existing rates even though they also be just and reasonable. As a consequence Willmut is contractually bound to pay the highest permissible price for gas until 1962. It is submitted that any construction of Will-

mut's contracts and the Natural Gas Act that brings this result is clearly wrong.

### POINT III.

**United Gas Pipe Line Co. v. Mobile Gas Service Co., 350 U.S. 332, 100 L.ed. 373 (Mobile), and Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348, 100 L.ed. 388 (Sierra), Are Conclusive in Favor of Respondents.**

The decisions of this Court in *Mobile* and *Sierra* are, as interpreted by the Court of Appeals of the District of Columbia, conclusive and determinative; and that herein fundamentally sought is substantially a rehearing. This Court knows both esoterically and exoterically the issues and decisions and to attempt to tell this Court what it has decided and why it has made that decision transgresses. We advert to the effort of United to create public sentiment. *Public Utility Fortnightly*, August 28, 1958, Vol. 62, No. 5, p. 289. Congress is the source and there are limitations that conclusively bind the Commission because (a) Congress may not delegate certain strictly legislative powers, *Panama Refining Co. v. Ryan*, 293 U.S. 388, 79 L.ed. 446; but, especially, (b) the Commission is not the admeasurer of the power that was to it delegated. Mr. Justice Reed said in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 88 L.ed. 333, 354-5:

"The Congress may fix utility rates in situations subject to federal control without regard to any standard except the constitutional standards \* \* \*. A commission, however, does not have this freedom of action. Its powers are limited not only by the constitutional standards but also by the standards of the delegation. Here the standard added by the Natural Gas Act is that the rate be 'just and reasonable.' \* \* \*"

When, as here, the Commission assumes to admeasure contra to the admeasurement of this Court and of Congress, it becomes substantially a judge of its own powers and is subject to the limitations imposed.

The contract between United and Willmut, having contractually fixed the obligations until August 1, 1962, as to the terms of the schedule made effective, did not reconfer administrative jurisdiction on the Commission by the provision "or any effective superseding rate schedules." The phrase "effective superseding rate schedules" is not self-limited. Thereinto petitioners may assume to integrate all factors of "flexibility" determined advantageous without limitation save self-aggrandizement. The terms to put in the "superseding schedules" are not contractually defined and before being contractually defined and being thereinto integrated, definition by mutual consent is a condition precedent.

(a) Under the contract of 1943, Appendix "B", there were express provisions:

(1) Fixing the price at 25¢ per Mcf until July 25, 1947;

(2) An express provision:

"The price to be paid by Buyer to Seller for each such thousand (1,000) cubic feet of gas sold and delivered to Buyer hereunder during each succeeding five (5) year period of this agreement, after July 25, 1947, shall be determined by agreement between the parties not less than twelve (12) months prior to the beginning of each of such five (5) year periods and failing so to agree the determination of the price shall be submitted to arbitration as hereinafter in this Section VII provided."

(3) The expiration date was August 1, 1962, and until that date (a) Willmut might not sell with-

out endeavoring to bind its purchaser to conform thereto, and (b) United might not sell without its purchaser becoming likewise obligated.

(b) Accordingly, under *Mobile and Sierra*, until July 25, 1947, there was unquestionably a contract, even under petitioners' claims, and accordingly thereas to there was no administrative jurisdiction in the Commission.

(c) There had been strained relations between United and Willmut wherein United in order to punish the City, which was in an ocean of gas, charged 25¢ per Mcf for delivering exclusively intrastate gas from Gwinville to the City, notwithstanding the franchise, quoted *supra*.

(d) When Willmut, being an insignificant organization exclusively engaged in the distributing function, was bold enough to challenge United's rates, with the assistance of the City, on the ground that they were (1) unjust and unreasonable and (2) discriminatory, it was helpless by reason of its financial condition before the Commission because it could not as to the just and reasonable feature produce the evidence the Commission thought requisite and necessary to make a full-blown rate case. The City's charter did not warrant the appropriation thus to protect, even if the City had had the funds essential, which it did not. Due to the flagrant discrimination, which was apparent on the record, the City, along with Willmut, got an order wherethrough gas that need not move more than forty miles from Gwinville to the City had to be paid for at 17.5¢ per Mcf, the same rate that United had fixed for importing foreign gas moving hundreds of miles.

(e) Willmut and the City still persisted in pressing for "a just and reasonable rate" for the City and ultimately a contract was made specifically agreeing to a domestic rate. The amount was specified in the so-called service

agreement, and though unsatisfactory, the president assumed to agree; and there was made a contract whereby for a term of six years approximately the City was entitled under the contract to a rate of 20¢ per Mcf for all gas delivered during the billing month up to that number of Mcf obtained by multiplying the billing demand for the month by 8; 15¢ per Mcf for all gas delivered during the billing month in excess of the number of Mcf billed at 20¢ per Mcf—being expressed in the contract by the symbol "Schedule DG-J." As to this there can be no doubt that

(a) this amount was arrived at by agreement—the meeting of the minds; (b) that it was to continue for six years; and (c) that the relationship between Willmut and United was of such a character as that it would be preposterous, with deference, to presume that, circumstanced as Willmut was, it would give to United a blanket power of attorney whereunder at pleasure United might set aside the contractual rate, whereasto jurisdiction in the Commission was not, in virtue of the words in the agreement "or any effective superseding rate schedules." Especially is this true since the advance so assumed to be imposed by United would have to be passed on to the ultimate consumers pursuant to a rate fixed by the constituted authorities of Mississippi possessing plenary power as to intrastate rates. If said Mississippi Commission did not approve (as it did not), there would have been imposed upon Willmut the entire loss; and the jurisdiction between the State and the Nation would thus be drawn sharply in question, and the implication drawn against the authority of the Federal Power Commission. Compare *Marin v. United States*, 356 U. S. \_\_\_\_, 2 L.ed. 2d 879; *Chicago, M., & St. P. R. Co. v. Illinois*, 355 U.S. \_\_\_\_, 2 L.ed. 2d 292. Further, there is a Federal tax of 52% upon income, so that if the distributor undertook to collect this increase from the ultimate consumers, it must be very mindful of this factor. Compare

*Commissioner of Internal Revenue v. Brooklyn Union Gas Co.*, C.A. 2, 62 F. 2d 505; *North American Oil Con. v. Burnet*, 286 U.S. 417, 76 L.ed. 1197. When and whether the distributor would recoup the same would remain a question. To precipitate into these tax difficulties a small distribution company, with deference, cannot be done by implication of a consent which no sane institution would have vouchsafed. If United's contention that the contract conferred this power to be thus exercised, thereunto there was a contract *inter se*; and, so being, under *Mobile* and *Sierra*, there was no Commission administrative jurisdiction. No one would have the hardihood to contend that *Mobile* and *Sierra* did not as to this contract rate, initially fixed to continue for a period of six years, preclude administrative jurisdiction here. Now, note the effect of "any effective superseding rate schedule." Was that an agreement by Willmut and the City that the contract rate and terms, whereunto the minds had met, could be vacated by United under the guise of filing with the Commission a new rate schedule? Without an express covenant thus providing, could the parties have intended such a filing to operate as a novation and terminate the express contract rate and terms?

(f) The Commission in its brief, referring to Sections 4(e), (d) and 15 (a), assumes to say, Br. pp. 51-52:

"\* \* \* While the purchasers' opposition to the new rates may be motivated by selfish interests, the Commission may permit intervention under Section 15(a) only if it regards their 'participation in the proceeding (as being) in the public interest.' Thus, while the Commission is not required by statute to institute a Section 4(e) proceeding with regard to all new filings under Section 4(d), and United's new rates could have become effective merely upon compliance with the requirements of Section 4(d), the fact is that

when the Commission set the new schedules for hearings as authorized in Section 4(e) then the purchasers were free to petition for intervention under Section 15(a) on the ground that their participation might be in the public interest."

Such casual action, not required by law, violates procedural process. *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 59 L.ed. 1027, *infra*.

Under the Commission's interpretation of this contract requiring the schedules to be "effective" and "superseding," it has, with deference, the hardihood to claim that the purchaser might not thus agree with the seller. In fine, under Sections 4(d) and (e), the Commission appropriately claims the right to supersede the power to contract between buyer and seller and goes one step further. If, under the Commission's viewpoint, it did not see fit to order a hearing, the City and its ultimate consumers would have been crucified, for under *Sierra* when Willmut and United contractually fixed the rate as hereinabove set forth the Commission's jurisdiction was limited to a vacation of this specific rate only as set out in the *Sierra Case*, 100 L.ed. 395:

"\* \* \* In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory. \* \* \*"

The "effective superseding" schedules have been made the subject of express contract and when contracted as to, the Commission's jurisdiction, under *Mobile* and *Sierra*, terminated; but *United* and the Commission may have all that whereto they are lawfully entitled if they will accept a tariff in the true sense and not seek to have exclusive

contractual rights for a long term in addition integrated. Not even the Commission could contend that it could relieve either United or Willmut from the obligation to integrate covenants as to future purchasers of the respective systems unless perchance this covenant was illegal. The City does not challenge the right of United to have a tariff such as are now in effect by the rail carriers.

After August 1, 1962, unless this contract is extended, there can be no question but that United will have all of the Elysian pleasures portrayed by the Commission when it shall have freed itself from contractual obligations specifying particular rates. Substantially United attacks the maxim "Id certum est quod certum reddi potest", 42 C.J.S. 373. United just as effectively fixed the first rate under schedule, as it did the 25¢ rate under the contract of 1943, and having thus done, as it had a right to do or not to do as it saw fit, it may not relieve itself of the contractual burdens inherently incident. The Commission assumes that after this contract rate was fixed for the benefit of the ultimate consumers that it thereafo had the jurisdiction admeasured by just, reasonable and non-discriminatory. This we challenge.

The Commission concedes that as to industrial gas for resale, there may be no suspension of the rate. It is true the Commission has since 1951 advised Congress that Congress was wrong and the Commission was right, and that this should be rectified, but as this Court commented in *Connecticut P. & L. Co. v. Federal Power Commission*, 324 U.S. 515, 89 L.ed. 1150, when the Commission recommends and Congress acts, there is approval; equally so, when it refuses to act, there is disapproval.

Further, in its brief, the Commission said, Br. pp. 78-79:

"Moreover, each rate increase filed by the pipelines under Section 4(d) pursuant to their service-

agreements has received close scrutiny from the Commission to make sure that the new rate complied with these cost-of-service standards. Thus, while the Commission is not, as respondents point out (Br. in Opp. 17), required to enter upon a hearing in connection with every new rate filing under Section 4(d), the Commission has, in actual practice, suspended all non-industrial rate increases filed by the pipelines with only infinitesimal exceptions; as a result, all such increases are reviewed by the Commission in Section 4(e) hearings. Those affected by the new rates, including the purchasers, both direct and indirect (such as respondents), have typically been permitted to intervene and to question the lawfulness of the new rates through cross-examination of the witnesses introduced by the pipelines and the Commission's staff, as well as through their own experts."

But this is a right granted by the Commission gratuitously without mandate from Congress thereunto and hence ineffective. But when, as to the City, this precise condition existed as to the 25¢ rate, the Commission commented as quoted *supra*. United has epitomized in its brief, quoted *infra*, that requisite for the Commission to know before it acted. For the city (not being a party to the contract) to read, mark and inwardly digest the factors relied upon by petitioner for its aggrandizement—not once, but four times—would deprive the City of property contrary to the Fifth Amendment.

The right to contract is specifically vouchsafed by both *Mobile* and *Sierra* and, going a bit further back, this Court in *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U.S. 184, 40 L.ed. 935, quoted to approve that said by Mr. Justice Jackson, thus, p. 939:

"We prefer to adopt the view expressed by the late Justice Jackson, when circuit judge, in the case of *Interstate Commerce Commission v. Baltimore &*

O. R. Co., 43 Fed. Rep. 37, 3 Inters. Com. Rep. 92, and whose judgment was affirmed by this court, 145 U.S. 263 (36:699), 4 Inters. Com. Rep. 92:

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

When, as pointed out in *Mobile* by Mr. Justice Harlan, Congress used the word "contract", it was the intent that a contract be a contract, and not a point of departure through which by conjoint action of the Commission and United the rights of the other party could be violated. Before the Act may be construed as the Commission contends, there would have to be therefrom the deletion of the word "contract" with its effectual filing with the Commission. If the Commission's theory be allowed and the express finding of this Court as to the effect of the integration into the contract of specified rates (embracing terms desired thereasto) be overruled, the difficulties that will inhere are graphically set forth in the order made in *Tyler Gas Service Co. v. Federal Power Commission, C.A., D.C.*, 247 F. 2d 590, and an order of the Commission of August 13, 1958, *In the Matters of United Gas Pipe Line Company, Docket Nos. G-1142, et al.*, wherein the contrariety between the Commission, United and Tyler is made manifest. In the order, it is stated, pp. 4, 5:

"United and Tyler Gas, having terminated the prolonged judicial controversy existing between them since 1953, in essence, seek to terminate the administrative proceedings pending before us with respect to the rates charged by United to Tyler Gas since August 3, 1952, and to reinstate the rates provided in the amended contract. We are inclined to agree that these pending matters should be terminated, as there must be some end to controversy and the administrative process as well (*Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151, 175; *Bi-Metallic Investment Co. v. Colorado*, 239 U.S. 441, 445). This order should be the final one in the 'ceaseless struggle' referred to by the United States Court of Appeals for the Fifth Circuit in its opinion in *United Gas Pipe Line Co. v. Tyler Gas Service Co.*, 247 F. 2d 681, just as the District Court referred to the matter before it as the 'final engagement' in the 'ceaseless struggle'."

Congress has not required of the Commission that caution, including notice, which it seems to have exercised. It has been said, maybe improperly, that the Commission has not adequate funds and is presently almost overwhelmed, certainly by the well-head case, but what Congress has said is that United and Willmut have the right hereasto to contract and not only have the right to contract but have contracted and the effect of their contract is not, with deference, an administrative matter but one whereasto the jurisdiction of this Court is plenary. *Marin v. United States*, *supra*.

United may have all of those things so admirably portrayed by the Commission and United, if it will not overreach itself by making a contract for a fixed time and thereby excise administrative Commission jurisdiction. United has substantially five times sought to make a finding as against the contract rate and has thus, since 1955, impleaded, if the Commission be correct, this number of "ef-

fective superseding rate schedules". It is obviously true that the mere allowing of a rate to be filed by United cannot make of that rate one that is "effective" and one that is "superseding" when under the Act, as claimed by United, there remains this obligation to refund. In short, so long as this remains undetermined, the rate cannot be either "effective" or, certainly, not "superseding".

#### POINT IV.

#### Commission's Contention As to the Necessity for and the Right to Have a "Flexible" Contract Fundamentally Unsound.

The Commission contends, Br. p. 2:

"Whether, under this Court's decision in United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, the filing of schedules increasing a natural gas company's rates for jurisdictional sales of natural gas must be rejected by the Federal Power Commission where, although the purchasers have not agreed to the specific amount of the increase, the existing agreements with the purchasers reserve to the natural gas company the right to change its rates, subject to the Commission's power of review under Section 4(e) of the Natural Gas Act."

Our response is multiform:

1. The Commission assumed that the pipe line and the distributor have a valid contract existent between United and Willmut until August 1, 1962. Here the Commission claims that Willmut has not specifically fixed the price to be paid in virtue of the contract provision "or any effective superseding rate schedules". But United and Willmut have primarily fixed this price during the entire period at a specific amount, say, 20¢ per Mcf. This fixation is conceded by the Commission to have been by

contract and if by contract then administrative jurisdiction thereunto was fundamentally excluded, for, as above shown, the sole right of United, *quoad* the initial fixation, was as expressed in the *Sierra* case. By such fixation, both parties bound themselves mutually. When the Commission declares that the price has not been fixed throughout the entire period, it fundamentally misconceives the express contract. There is no room, with the price expressly existent until August 1, 1962, to assume to say that the parties thus competent to contract have authorized a plussing of that contractual rate during this specific period of time. There is no provision to Willmut to reduce or to United to increase and this, both *Mobile* and *Sierra* hold.

2. The Commission assumes to say, notwithstanding the relationship of the parties, that Willmut has under contract (excluding Commission administrative jurisdiction) made a specific reservation "to the natural gas company the right to change its rates". Fundamentally, therefore, the Commission assumes the wholly untenable position that United, seller, has been by Willmut, buyer, authorized in writing under the statute of frauds, which operates in a double aspect, to augment the price 100% at its pleasure, notwithstanding Willmut was wholly unwilling to agree to any such increase, and, if it did, tentatively to become subject to income tax and other unspecifiable difficulties. This<sup>9</sup> augmentation must, therefore, unless the Court agrees with us under Point I, *supra*, have occurred by an authorization from Willmut to United for United to represent itself in dealing with itself to impose not only upon Willmut, but the ultimate consumers for whom Willmut was trustee in this aspect, such burdens as it sees proper. The City, under its charter powers, was unable to make a valid contract for a fixed rate. *Meridian*

*Light & R. Co. v. City of Meridian*, D.C., S.D.Miss., 265 Fed. 765; *Railroad Commission of State of California v. Los Angeles R. Corp.*, 280 U.S. 145, 74 L.ed. 234.

Herein, these contracts were to be by United wholly performed by the delivery of this gas within the State of Mississippi and payment therefor was to be made for such utilization by Willmut to United, so that the place of performance of these contracts is the law which admeasures their obligation, which is Mississippi; and its obligations there existent may not be constitutionally transferred therefrom. *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 78 L.ed. 1178. Specific reference is made to those facts appropriately found by the Examiner in Docket No. G-1158 whereunder United was seeking to destroy Willmut, and Willmut, as well as the City, was wholly conversant therewith and apprehensive thereof.

The Commission assumed to hold erroneously, in construing this isolated segment of the contract, that United has a right to publish under Section 4(d) of the Act any advanced rate or terms it chose even though thereby the dual relationship as to State and National jurisdiction was vitally affected. The Commission concedes that the Act does make it mandatory that hereafter there be a thorough hearing *inter partes* but under the Act the Commission may allow the rate so published to become final and if the Commission so does, as shown *supra*, under Section 15(a) of the Act, Willmut and the City would be without right to challenge and be compelled to pay the rate though it were illegal. Compare *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 95 L.ed. 912; but due to the fact that the action taken by the Commission is gratuitous and not mandatory, contract rights may not be thereby divested. *Coe v. Armour Fertilizer Works*,

*supra*. The sole recourse of the City and Willmut, when it so did, was to become a party to a full-blown rate hearing before the Commission and have their rights adjudicated in a system-wide hearing when there was an exclusive contract effectual for the City. The Commission adverted to the interpretation in *Mobile* as being "narrow".

The Commission gave United, the party of the second part, the right to alter this contract, *quoad* rates, thereasto saying that the words of the foregoing provision "clearly contemplate the understanding and intent of the contracting parties that changes could properly be made by United in the rates contained in the applicable rate schedules in effect at the time of the execution of the service agreement. It is equally clear that it was the understanding and intent of the parties that the purchaser would pay the rates set out in the applicable rate schedules effective from time to time and that changes would be made therein by United under the procedures established under Section 4 of the Act". But the Commission could not embrace Hattiesburg and Willmut within this category when the City was without power thus to contract and Willmut without a willingness thereasto. While it might be that this Court could hold that such an agreement conferred jurisdiction upon the Commission, yet the Act was absolutely impotent as to State sovereignty where the local regulation remained wholly unimpaired. *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329, 95 L.ed. 993.

The adverse positions between Willmut and United appear at length in Docket Nos. G-1142 and G-1158, wherein Willmut obtained relief against United for continuing in force a discriminatory gas rate of 25¢ per Mcf, *quoad* Willmut for Hattiesburg, while giving to United's affiliate at Jackson and environs a 17.5¢ per Mcf rate.

The position taken initially is that under the law generally and of Mississippi specifically, such a filing as was attempted by Docket Nos. G-9547, G-10,592, G-12,801 and G-15,360, by United for its own profit, could not impose a binding obligation upon Willmut and its ultimate local consumers to enter into a full-blown system-wide investigation of rates, wherefor, by reason of its condition, it was wholly hopeless and so thus to require would be a deprivation of property without due process. *Ex Parte Young*, 209 U.S. 123, 52 L.ed. 714. The Mississippi law gives Willmut the right to consent before a contract, valid in its terms, can be modified by the adverse party. The obligation of a contract may not be thus impaired even though the Nation is not mentioned in the Contract Clause. Assuming, *arguendo*, that Willmut had in writing thus constituted United its agent so to file (we discard the theory that United as against Willmut might file and thus effectuate), Willmut had a constitutional right to refuse to ratify; and ratification of that done by United constituted and was a condition precedent to the validity of the publication. *Wildberger v. Insurance Co.*, 72 Miss. 338, 343, 17 So. 282, wherein it was said:

“ \* \* \* And it may with equal force be said that the same human being—subject to the temptations springing from that self-interest which leaves the balance so ‘rarely right adjusted’ in the best of men—cannot, by some magical process, separate himself into two wholly distinct characters, and, in one character as agent of an insurance company, contract with himself, in another character, as receiver, or otherwise, having always a personal interest in the contract adverse to his principal. It would require a faculty for judicial analysis which could  
\* \* \* sever and divide

A hair twixt north and northwest side—  
a casuistry too refined and sublimated for the practical

affairs of business life, to find in a doctrine that would uphold such a contract, a rule of action safe for common sense dealing. 'No man can serve two masters.' "

Approved in *Riverside Development Co. v. Hartford Ins. Co.*, 105 Miss. 184, 62 So. 169, 170. *Sp. Farmers Loan & Trust Co. v. Northern Pac. R. Co.*, Circuit Court, Wis., 66 Fed. 169. See, also, 9 A.L.R.2d 10, 18; 2 A.L.R.2d 227, 230; *Parkerson v. Chapman*, C.A.4, 179 F. 2d 208; *Twin-Lick Oil Co. v. Marbury*, 91 U.S. 587, 23 L.ed. 328.

Thus United could not, motivated by its personal interest, become a second party, but only could act in a representative capacity for Willmut, if that were permissible. When United assumed so thus to act in naming and publishing the effective superseding rate, Willmut could only become bound thereby through ratification, having in virtue of the relationship of United to itself a right to repudiate if that assumed to be done by United was for the profit of United and to the detriment of Willmut. *Knox Glass Bottle Co. v. Underwood*, \_\_\_\_ Miss. \_\_\_\_, 89 So. 2d 799, certiorari denied 353 U.S. 977, 1 L.ed. 2d 1137. The rate as filed by United with the Commission could not become effective until ratified by Willmut and there is no authority, under the Act, for Willmut to file any such perfecting ratification. *Mississippi Power & Light Co. v. Memphis Natural Gas Co.*, C.A. 5, 162 F. 2d 388, certiorari denied 332 U.S. 770, 92 L.ed. 355. The fallacy is more fundamental, and its principle is found in the maxim "Nemo Potest esse tenens et dominus", 66 C.J.S. 4. So United cannot be the party of the first part and at the same time the party of the second part. The law requires it to be a United and its effort to become twins is illegal.

There is no pretense that Willmut has at any time consciously foregone its contract rights under these agree-

ments; and when United assumed thus to contract and bind Willmut, it likewise bound itself.

The Commission's assumption in Opinion and Order No. 295 that United may have a contract with Willmut in such a form as that United may demand of Willmut at pleasure that which pleases United is a fundamental violation of the law of contracts and Section 4(d) of the Natural Gas Act did not assume to authorize. *Perry v. United States*, 294 U.S. 330, 79 L.ed. 912. The maxim "Facit per alium facit per se", 35 C.J.S. 384, is here applicable for the Commission in instituting essentially becomes an agent of United.

3. Somewhat reversing the order adopted by the Commission in Opinion and Order No. 295, we contend that the Commission erroneously assumes the following:

(a) "United's proposal for increased rates in this proceeding does not constitute a prohibited unilateral change of a contract, for the contract language supplies the purchaser's assent to United's filing of a change in rates". (p. 9)

Note "the contract language supplies the purchaser's assent." This is shocking, for with relations as they were, Willmut would never have thus invested United with that power which could effectively have put Willmut out of business.

In addition, the assumption by the Commission of the right in United to change at pleasure the fundamental provisions of the contract destroyed the contract, for a contract requires a binding obligation to be upon at least two parties. It requires a meeting of the minds of the parties as to that to be done.

In 12 *Am. Jur.*, "Contracts", Sec. 66, p. 558, it is said:

"A reservation to either party to a contract, of an unlimited right to determine the nature and extent of his performance, renders his obligation too indefinite for legal enforcement. \* \* \*"

See, also, 17 *C.J.S.*, "Contracts", Sec. 318, 736; and *A.L.I., Restatement of Contracts*, Sec. 32. *Sp. Vicksburg Waterworks Co. v. Guffy Petroleum Co.*, 86 Miss. 60, 38 So. 302. In 12 *Am. Jur.*, "Contracts", Sec. 24, p. 521, it is said:

"\* \* \* Unless an agreement to make a future contract is definite and certain upon all the subjects to be embraced, however, it is nugatory. An agreement that they will in the future make such contract as they may then agree upon amounts to nothing. To be enforceable, a contract to enter into a future contract must specify all its material and essential terms and leave none to be agreed upon as the result of future negotiations. \* \* \*"

United sought these advances for its own profit and, *quoad* Willmut and Hattiesburg, its position is accurately reflected as an express trustee in *Acme Brick Co. v. Arkansas Public Service Commission*, Ark. \_\_\_\_, 299 S.W. 2d 808, wherein it was said:

"\* \* \* To the above end, the utility holds and must manage its property in the nature of a trusteeship. In the case of *City of Ft. Smith v. Southwestern Bell Tel. Co.*, 220 Ark. 70 at page 85, 247 S.W.2d 474 at page 483, we said: 'The utility must use all its receipts as though they were a public trust.'"

*Sp. Talcott v. Pine Grove*, Fed. Cas. 13735, 1 Flip. 120, affirmed 19 Wall. 66, 22 L.ed. 227.

That thus dealt with was additionally by the Act specifically made subject to a trust in favor of the consumers.

The Arkansas Court, when adverting to the trust relationship and the obligations of the trustee not to be rec-reant to the public, cited from the Court of Appeals of the District of Columbia *City of Detroit, Mich., v. Federal Power Commission*, 97 U.S. App. D.C. 260, 230 F.2d 810, certiorari denied 352 U.S. 829, 1 L.ed. 2d 48, rehearing denied 352 U.S. 919, 1 L.ed. 2d 125.

That Court in thus dealing with the right of fixing rates for disposition was at pains to point out the necessity of explicit proof between third parties thereasto; and when there was a fiduciary relationship, the law has demanded the utmost good faith and precluded any person from profiting through its position of trust and always allowed the pleasure to the beneficiary to refuse to ratify if dissatisfied with that assumed to be done by the trustee for its own benefit, especially a municipal corporation acting here as Hattiesburg has done.

In *Twin-Lick Oil Co. v. Marbury*, 91 U.S. 587, 23 L.ed. 328, 330, this Court said:

"\* \* \* The general doctrine, however, in regard to contracts of this class, is, not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represented by the party claiming under it. We say, that is the general rule; for there may be cases where such contracts would be void ab initio; as when an agent to sell buys of himself, and by his power of attorney conveys to himself that which he was authorized to sell. But even here, acts which amount to a ratification by the principal may validate the sale."

See, also, *Knox Glass Bottle Co. v. Underwood*, *supra*. Thereasto, the law did not assume to question the personal election of the party wronged. Yet in this case, with United dealing with itself as a trustee, the Commission unlawfully permitted United to make a fixation of rates.

The law never has allowed a trustee thus to deal with himself for his own aggrandizement, especially at the expense of the public. Yet the Commission in this case has pretended that United may, at the expense of City and the ultimate consumers, name such a rate without supervision and require this small distributing company, for the benefit of its ultimate consumers, to overthrow with its own resources such a fixation in a full-blown rate case, if perchance the Commission has seen fit to suspend and then allowed these parties to intervene. Our challenge is fundamental: (a) the power of attorney is void, being executed before action brought, Sec. 1545, *Recompiled Mississippi Code of 1942*; and (b) the authorization to a trustee thus to abrogate his trust for personal profit is not to be tolerated, especially when, *quoad* Hercules Powder Company, the amount in excess of the prior published rate will be retained by United though it be criminal, and no refund whatsoever thereunto is potentially possible unless City's contention is sustained.

Any illegality integrated by United taints the entire contract, and the contract must be so interpreted as to make it law-conforming as can be easily done by abandoning the false conception of the Commission in Opinion and Order No. 295, and allowing the initial rate to continue until the contract terminates. It might be that United will claim that there was no necessity for the insertion of "any effective superseding rate schedules" and that Willmut and United could without such a stipulation have made a binding agreement, but these words are found in the contract. They mean precisely what they say and certainly they cannot be expanded so as to create in United an agency with authority to act in such a wise as to allow an interested party to contract with himself for himself at the expense of the ultimate consumers for whose benefit Congress ex-

pressly legislated, contrary to said Section 1545, if the proceeding before the Commission be within its terms. When it so did, it made express provision for the "contracts" to be filed and when so filed, they were exclusive, normally, of Commission's administrative jurisdiction. *Federal Power Commission v. Interstate Natural Gas Co.*, 336 U.S. 577, 93 L.ed. 895.

Our interpretation of this contract as to this superseding rate schedule limits such schedule to one based upon consent (or protection under the police power). No other would effectively supersede. United was at pains to insert a provision as to alienation in the contract and the integration of a covenant thereinto. The interposition of the superseding rate schedule was requisite to vouchsafe validity thereto, for when and if United ceased to be owner, the succeeding natural gas company would be that which had to thus publish. See *Mississippi Power & Light Co. v. Memphis Natural Gas Co.*, C.A. 5, 162 F.2d 388, and Section 4(c) of the Act. The rate assumed to be filed under Section 4(d) could not be "effective" or "superseding" *per se*, *quoad* the contract rate. To eliminate the contract rate it had to be both, which inherently was, at its filing date, impossible, unless by Willmut's agreement in a form adequate to bind the ultimate consumers.

(b) *Quoad* Hercules Powder Company, the large industrial consumer, immediately upon the filing, if United's contention be true, United would collect the rate therefor fixed by United even though it should be \$5.00 per Mcf; and if thus allowed to be published as *extra* the contract, United would possess the power to destroy. Consciously, as explained in *Mobile, Sierra, Tyler Gas Service Co. v. Federal Power Commission*, C.A., D.C., 247 F.2d 590; *Portsmouth Gas Co. v. Federal Power Commission*, C.A., D.C.,

247 F.2d 90, and *Mississippi River Fuel Corp v. Federal Power Commission*, C.A. D.C., 252 F.2d 619, United, as a natural gas company, was not mentioned in Section 5(a), and the failure thus to do was not inadvertent. According to the Commission's ruling under Section 4(d), United would retain the \$5.00 per Mcf until by a proceeding it had been vacated as to the future at the cost of Hercules and Willmut. Our contention is that this right thus to appropriate Hercules' and Willmut's funds and retain the same, notwithstanding cancellation by the Commission, would render this section unconstitutional under *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 81 L.ed. 511.

Under *United States v. Witkovich*, 353 U.S. 194, 1 L.ed. 2d 765, Section 4(d) must be limited so as not to authorize United to take and hold that which is not its own. *Sp. Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 1 L.ed. 2d 972.

(c) Assuming United thus to be a trustee, it is made judge in its own case to exact that which it deems appropriate without any adequate rule of law admeasuring the same. "Nemo debet esse iudex in propria causa", 66 C.J.S. 4. Constitutional validity has been long passed when this result is sanctioned. *Tumey v. Ohio*, 273 U.S. 510, 71 L.ed. 749.

The wilful exaction under Section 21 of the Act may constitute a crime.

(d) Furthermore, it might well be contended that the initial rate was not superseded until there had been a final fixation by the Commission of that which was "thereafter" to be the rate. If this provision of the contract be thus interpreted as, with deference, it should be, there would be no constitutional difficulty whatsoever thereasto.

Strangely enough, if the Commission, as a commission, without precedent findings based upon adequate factual background, had assumed to substitute a superseding rate, such an action would be a nullity in flagrant violation of the Constitution. Compare *Federal Power Commission v. Sierra Pacific Power Co.*, *supra*; *Wichita Railroad & Light Co. v. Public Utilities Com.*, 260 U.S. 48, 67 L.ed. 124, and *sp. Secretary of Agriculture v. United States*, 350 U.S. 162, 100 L.ed. 173; *Southern Railway Co. v. Virginia*, 290 U.S. 190, 78 L.ed. 260. So when the Commission assumed to state that Willmut had contractually vested United with that which both equity and the Constitution expressly forbade, its interpretation, though administrative, was not entitled to be followed because of a fundamental misconception of the law. *Marin v. United States*, *supra*; *Mobile and Sierra*.

4. The Commission declared, Opinion and Order No. 295:

"\* \* \* the contract language supplies the purchaser's assent. \* \* \*"

But Section 1545, *Recompiled Mississippi Code of 1942*, prohibits; but if not, then the contract ceases to be a contract and becomes wastepaper. A contract to contract is void. *Vicksburg Waterworks Co. v. Guffy Petroleum Co.*, 86 Miss. 60, 38 So. 302; 12 *Am. Jur.*, "Contracts", Sec. 24, p. 521. Note that United has collected from Hercules through Willmut under an alleged publication and will continue to thus collect until the Commission adjudges the lawful rate, and then recovery will be forbidden as to all amounts previously received unless our contention be correct. United, the wrong-doer—potential criminal under the Act if done wilfully—is permitted to retain; and the wronged party will have no recovery but only rectification as to the future. It is, therefore, our insistence that presently the rate on

file to which consent has been given is the sole lawful rate and therefrom deviation may not be until, unless and except Willmut has voluntarily, with full knowledge, ratified and approved. *Knox Glass Bottle Co. v. Underwood*, *supra*.

5. The Commission next asserts, Op. 295, p. 9:

"The \* \* \* language from United's service agreements with the movants and others clearly indicates that mutual consent is provided in the service agreement to the filing by United for a change in rates and charges, pursuant to section 4(d) of the Natural Gas Act."

The declaration is that United and Willmut have conferred jurisdiction by agreement—consent. *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 75 L.ed. 1324; and *Stark v. Wickard*, 321 U.S. 288, 88 L.ed. 733. This is fundamentally unsound because:

(1) Affirmative legislation specifically conferring such a power in the Commission from Congress is a prerequisite. Cf. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 162 U.S. 184, 40 L.ed. 935.

(2) *Mobile* and *Sierra* recognized the paramount right (and we might add, the duty) of these gas companies to effectuate their business by long established contract relationships whereasto no implied repeal was. Cf. *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 51 L.ed. 553. The Commission being wholly without regulatory power over the contract, its jurisdiction was originated to bridge a particular chasm that went no further than to effectuate State regulation *per se*. Cf. *Hope Natural Gas Co. v. Federal Power Commission*, 320 U.S. 591, 88 L.ed. 333. Congress never intended, *quoad* such contracts with their diverse interests and facets, that a commission could,

by changing a price, compel the interrelations to be that which the parties did not intend. Appropriate delegation was constitutionally requisite.

(3) The Commission did not receive jurisdiction under the normal contracts between natural gas companies and their customers which were left as at common law. No repeal thereof was wrought by the Act (*Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, *supra*); and it would be indeed unfortunate for the Commission to continue to thus construe Section 4(d) so as to take from those possessing the constitutional right to contract their power so to do. *Prudential Ins. Co. of America v. Cheek*, 259 U.S. 530, 66 L.ed. 1044; and 16A C.J.S., "Constitutional Law", Sec. 575. Cf. *Missouri ex rel. Southwestern Bell Teleph. Co. v. Missouri Public Service Commission*, 262 U.S. 276, 67 L.ed. 981. The Act did not so do.

Tariffs may be changed at pleasure under regulation, but under the Natural Gas Act contracts may not so be. If United would only be content with what has been to it lawfully given by the Act, there would be no necessity for litigation; but United wants to hold distributors captive when these distributors are obligated to serve the ultimate consumers at just and reasonable rates and may be so thus compelled by State law. United thus potentially has the power of destruction, for if, by inadvertence, or, as occurs, the Commission did not notice United's filing under Section 4(d), all of these parties would be compelled to have a full-blown rate investigation to effectuate a just and reasonable rate. Willmut and Hattiesburg, as such, are not so circumstanced as to make this a lawful exercise of power.

#### 6. The Commission further said:

"The words 'or any effective superseding rate schedules on file with the Federal Power Commission'

clearly contemplate the understanding and intent of the contracting parties that changes could properly be made by United in the rates contained in the applicable rate schedules in effect at the time of execution of the service agreement."

With deference, this is fundamentally erroneous because a contract would cease to be a contract if one party to the contract could modify its terms to meet its desires, especially as under the Act all rates that are unjust, unreasonable or discriminatory are without exception illegal. The power of one party to introduce into the contract any rate deemed appropriate would unquestionably be unconstitutional. *United States v. Cohen Grocery Co.*, 255 U.S. 81, 65 L.ed. 516. In addition, the slightest excess over legality would make the party introducing it a criminal. If the Commission's contention be correct, there never was any contract because an obligation terminable at the will of a party cannot be made the basis of lawful relief; and, in addition, especially because:

(1) The reasons hereinabove assigned.

(2) Under *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 66 L.ed. 943, as interpreted in *United States v. Western Pacific R. Co.*, 352 U.S. 59, 1 L.ed. 2d 126, 133, it is respectfully submitted that this contract construction is for the courts, to the exclusion of the Commission, for the contract between the parties is in writing, in plain and simple terms, and the application of Sections 4(d), (e) and 15(a) is exclusively statutory construction. Compare as controlling *Mobile* and *Sierra* wherein the Commission assumed to construe the statute, given a definite contract, and this Court did not hesitate to rule as a matter of law what the rights under the contract were in virtue of these sections of the Act. *Marin v. United States*, *supra*. In *United States v. Western P. R. Co.*, 352 U.S. 59, 1 L.ed. 2d

126, 133, this Court made primary reference to the Interstate Commerce Commission requisite solely because:

"A tariff is not an abstraction. It embodies an analysis of the costs incurred in the transportation of a certain article and a decision as to how much should, therefore, be charged for the carriage of that article in order to produce a fair and reasonable return. Complex and technical cost-allocation and accounting problems must be solved in setting the tariff initially. \* \* \*."

But, notwithstanding, Mr. Justice Douglas dissented, and Mr. Justice Reed and Mr. Justice Brennan took no part.

The Commission here has assumed "from the service agreement" to construct the contract. This contract is in writing—speaks for itself. The Commission assumed to so interpret, but, with deference, the Commission has had the matter fully on this score developed. This Court has its conclusion as of law and not as of fact. The Commission may not build up a question of fact upon the face of an express contract so as to deprive the ultimate consumers of that to which they are lawfully entitled. Compare, further, *Union Pacific R. Co. v. Ore-Ida Potato Products*, C.A. 9, 252 F. 2d 505, 507, wherein in Footnote 5, it is said in part:

"\* \* \* The construction of a tariff provision presents a question of law. *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 290; 42 S.Ct. 477, 66 L.ed. 943. \* \* \*"

See, also, *United States v. Chesapeake & O. R. Co.*, 352 U.S. 77, 1 L.ed. 2d 140, 143; *Far Eastern Conference v. United States*, 342 U.S. 570, 96 L.ed. 576.

From a practical viewpoint the theory of the Commission that when intervention is allowed, it will give to a municipality, such as Hattiesburg, and a utility, such as Willmut, a full right to be heard ignores the fundamental

proposition that as a utility and as a municipality they have not that which is requisite and necessary for such a hearing. When the hearing accorded is such a one as that it is not effective, it does not square with the Constitution under *Ex parte Young, supra*. Note all of this occurs despite the express contract in virtue of a filing made by United—the author of the four increases.

(3) United and Willmut contractually fixed in specific cents in the 1943 contract the price of gas for a five-year period; and therein arbitration had to be, which was made conclusive as to each five year period up to 1962. A separate amount for each five-year period was an essential part of the contract and had to be fixed not by a filing under Section 4(d) but by an independent meeting of the minds or the equivalent through arbitration. Compare the *Tyler Case, supra*, and other authorities cited. Neither the City nor Willmut could, as shown by their actual acts, pursue the course which the Commission demands, if they would vacate the filing. It were better that the word of promise be not broken to the heart while kept to the ear.

(4) Willmut consistently maintained its independent position. If the Commission assumed to find what the understanding was, its finding was based purely on speculation, wherefor no substantial evidence could be found in the record in No. 13,683, before the Court of Appeals, District of Columbia, and if the judgment is to be based on this ground, let it clearly appear, please. Compare *Trunkline Gas Co. v. Federal Power Commission*, C.A. 5, 247 F. 2d 159; *Southern Railway Co. v. Virginia, supra*. Hattiesburg at all times has challenged. As shown by the litigation in Docket No. G-1158, United was perfectly willing to discriminate as to domestic gas from 1947 against Hattiesburg, giving to Jackson and the small towns about it a domestic rate of 17.5¢ per Mcf, while charging at

Hattiesburg 25¢, even though at one point only a street separated. Frankly, there is not a line in the record in No. 13,683, before the Court of Appeals, District of Columbia, which will, as a fact, support this assumed conclusion. United went to the expense of disconnecting and re-arranging its pipe lines in order to charge Hattiesburg 25¢ per Mcf while serving at Jackson at 17.5¢. United went to the limit of challenging the jurisdiction of the Commission, claiming to be exclusively in intrastate commerce.

(5) Willmut, realizing its limitations, would never have contracted that United could exercise fixation under Section 4(d) and compel Willmut with its insignificant income to fight a full-dress rate case upon battle lines chosen by United, when it understood the law to be that it had to consent to the effective superseding rate; and until it so did, the rate was not effective or superseding. It could not be, under the definition in *Webster's New International Dictionary*, 2d Ed., p. 2533, superseding unless it took the place of the contract rate; and, certainly, supersede it did not while it was lawful for the initial rate to continue in effect and to admeasure, as to domestic consumers, a return of all illegal excess. In short, effective superseding rate could not be, and not be at the same time. To become effectively superseding, the prior contract rate had to be effectively eliminated from the contract without possibility of reintegration thereinto. As pointed out by the Commission, United and Willmut could by agreement effectually name a superseding rate schedule, and it is Willmut's contention that contract alone is the sole available method therefor, applying the maxim, if there be doubt, "*Verba chartarum fortius accipiuntur contra proferentum*", *Broom's Legal Maxims*, p. 594.

United prepared this contract and as to every term therein other than the fixation of a just, reasonable, and

non-discriminatory rate, there was no jurisdiction in the Commission; and this pitfall—if pitfall it be—was wholly unappreciated by Willmut, which believed in good faith it was merely translating into dollars by using schedule reference. With deference, it is unthinkable that the Commission could, in virtue of its jurisdiction *quoad* rates, usurp the entire field of management and State sovereignty as well. Cf. *Missouri ex rel. Southwestern Bell Teleph. Co. v. Missouri Public Service Commission*, 262 U.S. 276, 67 L.ed. 981.

(6) The Commission has never as yet accomplished certain things:.

(a) The Commission has not fixed the rate base of United; and so to do will be a matter of extreme difficulty whereasto a company like Willmut would be absolutely hopeless and helpless if dependent upon its own resources. Remember the Valuation Section of the Interstate Commerce Commission. In addition to the rate base, United has:

(1) non-jurisdictional property;

(2) property utilized in direct sales whereover State authority is sovereign (Cf. *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm.*, 341 U.S. 329, 95 L.ed. 993); and

(3) other factors wherewith Willmut was wholly unacquainted. This would include the solution of the well-head price as made requisite by *Phillips Petroleum Co. v. State of Wisconsin*, 347 U.S. 672, 98 L.ed. 1035, whereasto as yet final determination has not been. Further, as determined in *Acme Brick Co. v. Arkansas Public Service Comm.*, *supra*, and in *City of Detroit v. Federal Power Commission*, *supra*, the fair field price might be allowed to excise a segment of the rate base, as well as other factors. Compare further, as to the

complications as to United, the decision of the Court of Appeals for the District of Columbia on the appeal in *Mississippi River Fuel Corp. v. Federal Power Commission*, *supra*, from the decision of the Commission in Docket No. G-1148. See, also, the *Tyler Case*, *supra*.

(b) The Commission has never as yet fixed the rate of return whereto United as a whole was entitled.

(c) The Commission has not fixed rate zones with the variant forms of service by United therein, with a proper allocation of these costs to the several zones, whereasto Willmut is potentially powerless, unless its contract be respected, where the rights of the consumers from Willmut must be respected.

Regarding whether or not United might be compelled to deliver Mississippi gas to Mississippians, all of these factors are essential in a "rate case" and the cost and expense thereto apparent from the Commission's records would wreck Willmut if it should thereinto enter and contend with this greater-than-Goliath. Willmut had no intention of conditioning its contract by assuming to defeat United in a general rate investigation. It delineated meticulously and sedulously that whereasto its contracts were and United may not compel it, hopeless and helpless financially, to engage in a system-wide rate struggle when its sole relationship is that of a trustee for its customers who will reap in large measure the fruits of its labors.

The Commission has assumed to say that one thus circumstanced could, though a trustee, name a rate and though under contract with Willmut, compel Willmut, on its own resources, to have a hearing and defeat United in its demands when, under universal law, United could not irrevocably bind Willmut by an adverse fixation when assuming to act as Willmut's agent, and especially could

not lawfully name and publish a rate that was unjust, unreasonable and discriminatory.

The criterion is the resources individually of Hattiesburg to contend. Such a remedy is not due process of law within the Fifth Amendment when, in 1943, and again in 1954, settlements had to be had on a compromise basis as to a rate base and rate of return. It may be that in these four concurrent attempts now being conducted by United, there will be a finding that is final as a rate, but it must not transgress the contract provisions. But thereasagainst Willmut and the City, as to their infinitesimal percentage will not have been afforded that protection which the Constitution guarantees when there was a contract. This catch phrase, distorted by the Commission from its true meaning, cannot take away protection under the law. Cf. *Ex parte Young, supra*. The contract must be so construed as not to present the serious constitutional question raised thereby, if this be allowed.

Therefore, the City and Willmut stand confidently upon the position that their rights under these several agreements are precisely the same as existed under *Mobile* and *Sierra*.

## POINT V.

### Response to United's Brief.

Response of City to Point I, Br. p. 15:

"THE EXECUTED SERVICE AGREEMENTS BOTH (A) EXPRESS THE CONSENT OF THE PARTIES TO THE MODE OF PRICE CHANGE WHICH PETITIONER HAS INITIATED AND (B) DESIGNATE PETITIONER'S FILED RATE SCHEDULES AS THEY MAY STAND FROM TIME TO TIME AS THE SOURCE FOR DETERMINING THE PRICE THE BUYER HAS AGREED TO PAY."

City challenges fundamentally, and for reasons therefor assigns:

1. Under the uniform contention of both (a) the Commission and (b) the petitioner, if petitioner saw fit to file a schedule alleged to be effective and superseding and the Commission took no action whatsoever thereon, but allowed it to become, in accordance with the Act, operative (notwithstanding the contract rights on file), thereby *per se* the Act would operate to divest the City's and Willmut's vested rights and transfer them without more ado to petitioner; so that in virtue of such filing alone and such failure to act, petitioner would have that which it precedently did not have and the City would be without those rights antecedently possessed. Such is *per se* an invasion of the Fifth Amendment by transferring from the City and Willmut to the petitioner. *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 81 L.ed. 510, 524.

The same would be true as to gas sold for industrial purposes. As to the residue, whether or not the Commission suspended the rate rested exclusively within their pleasure without any definition constitutionally guiding. *U. S. v. L. Cohen Groc. Co.*, 255 U.S. 81, 65 L.ed. 516. If, without Congressional direction therefor, the Commission assumed to give notice and an opportunity to intervene, it would be *ex gratia* and not *ex debito*. Thus the opportunity would be casual and constitutionally insufficient. Such a construction would invalidate. Compare *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 59 L.ed. 1027, 1032, where this Court said:

"Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitution for the due process of law that the Constitution requires. \* \* \*"

As to the Constitutional right to appropriate notice, at least to Willmut, compare *Roller v. Holly*, 176 U.S. 398, 44 L.ed. 520.

2. Petitioner contends, Br. p. 15:

"\* \* \* In the first place both petitioner and the respondent buyers, when executing these long-term service agreements, being fully aware of the statutory and regulatory significance of the language, intended thereby to invoke the machinery for rate change it described. \* \* \*"

This we challenge.

The petitioner then states that which it did before the Commission thus:

"Petitioner's superseding revised sheets were supported by the voluminous data required by Reg. 154.63, comprising two volumes each of several hundred pages, and were posted and served on each of petitioner's 47 purchasers (as listed) pursuant to Reg. 154.16.

"The 31 superseding revised sheets effected a general rate increase which, as stated in the explanatory accompanying material, was justified and necessitated by the increased costs of rendering service. The older rates had been based on cost of service for the 12-months period from May 1, 1954 through April, 1955, adjusted for known and measurable changes which would become effective within seven months from April 30, 1955. The new rates were designed so that each class of service (town border and pipe line) in each of the three rate zones where petitioner's rates are subject to the Commission's jurisdiction would provide revenues approximating the costs of service allocated to each class of customers in each zone.

"The two volumes filed in support of the superseding revised sheets set forth basic information which

the Commission deemed essential for the performance of its administrative duties. *The Commission could under § 4(e) of the Act review the new rate to determine whether it was 'just and reasonable'.* In the exercise of its administrative powers it had worked out certain formulae for determining a just and reasonable rate, which had been sanctioned by this Court in cases such as *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 605.

"In support of the new rates petitioners set forth in Statements A through N filed in conformity with requirements of Reg. 154.63 the detailed information and statistics relating to over-all cost of service, rate base and return, cost of plant, accrued depreciation, depletion and amortization, working capital, rate of return, gas operating revenues and sales volumes, revenue deductions, allocation of over-all cost of service, allocation of cost of service by zones, comparison of estimated revenues with cost of service, balance sheet, income statement and principal determinants essential to test the reasonableness of the rate. There was thus made available to the Commission, in the form in which it required, the information necessary for it to enter upon its administrative powers of review.

"Each of petitioner's 47 immediate purchasers, including Mississippi Valley, Texas Gas and Southern (but of course excluding Memphis), rendering service in 248 localities, therefore also had available to it all the information which the Regulations called for as reasons for and justification of the new rate. Each purchaser had opportunity to investigate, since the new rate could not become effective for *thirty days* under §4(d) of the Act unless the Commission otherwise ordered.

"The method thus followed was the same as that by which prior rate changes had been effected by United (R. 235) and by other natural gas companies under filed and posted tariffs."

Commenting, let the Court note that apparently these were those things submitted on the first application; but these figures, though thus multiform, were found inadequate by petitioner and led to an attempted second advance and then shortly, though apparently the petitioner had run the gamut, it found it essential to make an application for a third advance, and then still another was deemed essential by petitioner for itself and its aggrandizement. This multiplication of applications in and of itself demonstrates that the consumers at Hattiesburg should not have been besieged in this wise, when petitioner did not know when it approached the Commission what it would want within a very few months thereafter. To compel a systemwide cost study is indicative strongly of the injustice that may be wrought when contracts solemnly made are sought to be vacated, especially as the petitioner found it essential to negotiate with its large consumer as to the effect of the production by the parent corporation through the Union Producing Company.

Further, let the Court note that there is likewise a distributing company, and it was developed in Docket No. G-1158 that petitioner was responsible for a 49¢ rate at Philadelphia, Mississippi. Thus the parent, United, was within the evil rectified by Congressional legislation as to the anthracite railroads.

With these preliminary observations, and with that thus quoted as the contention of petitioner and the Commission, it is respectfully submitted:

A. That this being a contract rate and not one established under regulation, the rule of the *Sierra Case* was applicable and petitioner might not therefrom be freed otherwise than this Court did therein allow; but if therein we err, then:

B. The City, along with Willmut, had been before the Commission in G-1158 and likewise in G-1142, and we make reference to the prodigious cost incident to a cost-of-service systemwide investigation; and petitioner well knew from that time in G-1158 and G-1142 that neither the City nor the Company could take those steps requisite and necessary to have such a cost study made to determine whether or not they would object. Assuming that they had made such cost study, they were absolutely without the means of having such a hearing, and to compel the City, with its manifold civic duties, to expend the sum requisite would be a deprivation of property without due process. Compare *Ex parte Young*, 209 U.S. 123, 52 L.ed. 714, 723-4, where it is said:

"\* \* \* In *McGahey v. Virginia*, 135 U.S. 662-694, 34 L.ed. 304-314, 10 Sup.Ct.Rep. 672, it was held that to provide a different remedy to enforce a contract, which is unreasonable, and which imposes conditions not existing when the contract was made, was to offer no remedy; and, when the remedy is so onerous and impracticable as to substantially give none at all, the law is invalid, although what is termed a remedy is in fact given. See also *Bronson v. Kinzie*, 1 How. 311, 317, 11 L.ed. 143, 145; *Seibert v. Lewis*, *Seibert v. United States*) 122 U.S. 284, 30 L.ed. 1161, 7 Sup.Ct.Rep. 1190. \* \* \*

These general rate investigations frequently have consumed ten years in time, to say nothing as to the amount of money.

This contract is to expire in 1962 and if such an investigation were indulged in, it is highly probable that its determination would post-date by five years the end of the contract. Such a construction is unthinkable.

3. Let it be noted that there is an express provision, as quoted, Br. p. 18:

“\* \* \* no gas company may change a rate ‘different from those prescribed in its effective tariff and executed service agreements on file with the Commission, unless otherwise specifically provided by order of the Commission’ \* \* \*”

Now, we have an express contract rate which is *per se* exclusive and petitioner contends that this rate may be excised from the contract pursuant to the course delineated whereasto the City has absolutely no place. If the action of the petitioner is unlawful, then the contract rate persists. Whether the alleged effective superseding rate is lawful may not be determined for a period of ten years—the time required to adjudicate by consent in Docket No. G-1142—and if, under the proceedings before the Commission, the rate is then held unlawful, then the sole rate in effect consistently has been the contract rate. But suppose that the rate found by the Commission is not the filed rate, but a lesser rate, we do not read this contract as making operative any rate other than an effective superseding rate, so that there is no provision in the contract under which the rate thus found by the Commission (if it had jurisdiction) would be integrated into the contract because it is not an effective superseding schedule. That which has confounded the petitioner is a failure to distinguish between regulation and contract; in short, between rates given by regulation and contract given *inter partes*. The two cannot be lawfully mixed. A contract must remain a contract and its terms be made operative. Frankly, the experience of United seems to have been that it can and has more effectively settled by contract with its customers than by regulation. Incidentally, when United sought to integrate into this contract as lawfully superseding, it failed: (1) to therein consider that made requisite by *Phillips Petroleum Co. v. Wisconsin*, *supra*, and made no pretense whatsoever that it had conformed

to that which will be by the Commission ultimately found appropriate; (2) it failed to integrate that adjudged unlawful in *Mississippi River Fuel Corp. v. Federal Power Commission*, C.A., D.C., 252 F. 2d 622, which was by agreement adjudicated under the order of September 11, 1958, of the Commission. So that up to that date the jurisdictional powers of the Commission did not exist to make this rate effective and superseding.

4. As to the procedure before the Commission, Br. p. 18, frankly, the City solemnly asserts without reflection that Willmut was not conversant with the niceties assumed to be integrated therefrom in its contract and when it made this agreement fixing this amount to be paid in the contract, it did so in virtue of its constitutional right to contract. Petitioner may not substitute legislative regulation for common law contracts.

5. As to the multiform transactions affecting Memphis, it is never intimated that the City and Willmut were in any way conversant therewith and/or a party thereto.

6. We have never heard that a contract had to be "flexible", Br. p. 24. Flexibility at the pleasure of a party to a contract may not lawfully be otherwise than as the contract specifically provides. Here United seeks to admeasure its rights by its uncontrolled desires.

7. Petitioner specifically admits, Br. p. 24:

"\* \* \* By the same token, the service agreement which defined the basic relations between buyer and seller was required to be executed, *whereas the rate schedules* were to be supplied by the seller *ex parte*. \* \* \*"

In other words, the contract is to be severed and divided into two parts: one, contractual and obligatory upon the

purchaser; the other not contractual as to the seller, but subject to the *ex parte* change under certain limitations. This demonstrates the fallacy of the petitioner.

8. Counsel say, Br. p. 26:

"\* \* \* The tariff having been once filed and approved, the parties were bound to contract in the form and framework set by it and by the Regulations.  
\* \* \*

But this Court said the power to contract still persisted, which would not be true under counsel's statement in the *Mobile Case*.

9. Counsel further say, Br. p. 26:

"\* \* \* No natural gas company can claim a rate as a legal right that is other than the filed rate, as pointed out in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251. The buyer also had no choice but to pay the new rate.  
\* \* \*

Petitioner overlooks, as held in the *Mobile Case*, that an original valid filing under a contract is not set aside by an unlawful act of United though sanctioned by the Commission.

10. Counsel claim, Br. p. 27:

"These illustrations merely reinforce the point that in the evolution of administrative control through the Regulations, the material terms of the contract between buyer and seller have become in reality *predetermined by the Commission's requirements*. This fact it is which gives the rate schedule and any effective superseding rate schedules described in the service agreement their *independent vitality* recognized by the parties in this case."

This, we unhesitatingly challenge. Compare the *Mobile Case*. Note the quotation from the *Mobile Case*, Br. p. 28.

7. As to petitioner's argument that there has been a practical interpretation of the contractual rights so as to give to petitioner an additional right that does not expressly appear is challenged, Br. p. 30. Compare the interpretation of the Commission, which was erroneous in *Mobile*, *Sierra* and *Wisconsin*, and the solution must be here had of its statutory jurisdiction.

Response of City to Counsel's Point II, Br. p. 34:

**"JUDICIAL INTERPRETATIONS OF THE NATURAL GAS ACT AND RECOGNIZED PRINCIPLES OF CONTRACTUAL CONSTRUCTION REQUIRE THAT THE SERVICE AGREEMENTS BE CONSTRUED IN ACCORDANCE WITH PETITIONER'S CONTENTIONS."**

Our responses are:

1. Those hereinabove given.
2. Counsel say, Br. p. 36:

**"With these limits indicated and the requirement of filing and Commission review in any event, what more natural and inevitable than that the contracting parties, in stipulating a machinery of price change, should adopt the standards of the Act as enforced by the Commission in accordance with the Regulations?"**

\* \* \*

This, the City never *did*, and could not do. It did stipulate that an effective superseding schedule could become the price at which gas would be sold, but it never stipulated that it would sell its birthright and place itself squarely under United when it was conversant with what had been and especially with what it had just suffered.

3. The City protests as to "alleged words of art", Br. p. 37. If they be words of art, which is respectfully denied, then therein the City was not skilled, but knew

only the ordinary meaning of those terms so concisely contained in the specific contract.

4. Counsel claim, Br. p. 39:

"Even if this assumption were correct, the result is that Mississippi Valley when it executed the service agreements intended and consented to *flexible rates, variations in which could be initiated* by the seller in conformity with the requirements of §4. The fact that Mississippi Valley agreed to this provision for an incorrect reason—because it thought the statute gave United this power—does not derogate from its consent."

We respectfully insist this is but a construction of a contract and not that which United would have where its claimed intention of the parties would supersede that expressly written.

5. We challenge the declaration of the brief, p. 40, that the case of *Dayton Power & Light Co. v. Federal Power Commission*, C.A., D.C., 246 F. 2d 694, is an authority. The reason it is not is stated in the opinion.

6. The contention that: "A contrary construction of the executed service agreements would unconstitutionally deprive petitioner of contractual rights", Br. p. 40, *et seq.*, is inaccurate. Petitioner had no right to contract which was in any way impaired by the opinion of the Court of Appeals. Construction of a contract does not impair nor divest vested rights. *Huntington v. Laidley*, 176 U.S. 668, 44 L.ed. 630. There might be a deprivation of property by a judicial decision, but that is most extraordinary. *Roberts v. New York*, 295 U.S. 264, 79 L.ed. 1429.

7. Counsel say, Br. p. 40, the Commission has prohibited escalation, but that which United seeks is not an

addition in virtue of an outside independent factor, but the right to appreciate the price according to the opinion of *United* under facts whereasto *United* has assumed to act, becoming substantially judge in its own case. If this were permitted, the end of this independent operation serving the City would soon occur.

8. We concede that a statute altering the common law should be restricted as counsel contends, Br. p. 41, but the limitation thereon is accurately admeasured by later Chief Justice White in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 51 L.ed. 553, as follows:

"\* \* \* that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."

But, it is more important that the right to contract privately should persist. In the *Mobile* decision, Mr. Justice Harlan expressly held, 100 L.ed. 386:

"All of the relevant provisions of the Act can thus be fully explained as simply defining and implementing the powers of the Commission to review rates set initially by natural gas companies, and there is nothing to indicate that these were intended to do more. \* \* \*"

Of course, there must be the filing by the gas company, but note this phraseology, p. 386:

"\* \* \* The obvious implication is that, except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act: to establish *ex parte*, and *change at will*, the rates offered to prospective customers; or to fix

by contract, and change only by mutual agreement, the rate agreed upon with a particular customer. \* \* \*

9. We concede the rule stated, Br. p. 41:

"\* \* \* the decision of the Court of Appeals, to the extent that it rests upon a construction of the service agreements themselves, cannot be sustained because it violated the rule that of two possible interpretations of a contract the one which gives it validity is to be preferred. *Great Northern Ry. v. Delmar Co.*, 283 U.S. 686, 691 \* \* \*"

But the interpretation which petitioner gives to the contract would be to invalidate it for the Constitutional violations noted *supra*.

Response of City to petitioner's Point III, Br. p. 41:

"THE SERVICE AGREEMENTS CONFORM TO A WELL-DEFINED TYPE OF CONTRACT IN WHICH PRICE DETERMINATION OR PRICE CHANGE IS EFFECTED PURSUANT TO AN AGREED FORMULA BY REFERENCE TO EXTERNAL STANDARDS."

Our responses are:

1. Those hereinabove made.
2. The sole "extraneous circumstance" is self-aggrandizement by United at its uncontrolled discretion. Why four advances during this litigation? Authorities *supra*.
3. *Outlet Embroidery Co. v. Derwent Mills*, 245 N.Y. 17, Br. p. 42, is inapposite on its face. It would "turn this reservation into a privilege of arbitrary change", Br. p. 42. The amount of the tariff to be fixed by Congress, of course, could be added, but there could not be augmented, at the seller's pleasure, its idea of the increased worth of its service. The other cases cited are likewise inapposite.

4. Unquestionably, under some factual situations, there is such a rule as stated, Br. p. 43, but not here; it would violate the Constitution. Other cases cited are inapposite, except the case of *Ken-Rad Corporation v. R. C. Bohannon*, C.A. 6, 80 F. 2d 251, involving an agency contract between a manufacturer and a distributor wherein there was to be compensation to the distributor upon an agreed basis, with the rights in the manufacturer to change the list prices to the customers as it saw fit. Responding to the contention advanced by petitioner, the Court said, p. 253:

"The validity of the contract is challenged on the ground that it lacks definiteness and mutuality. We do not so regard it. While price is not fixed, it is capable of definite ascertainment by reference to the manufacturer's list prices, even though the latter reserved the right from time to time to change price and rate of discount. \* \* \*"

This is fundamentally variant from the contract here before the Court.

This principle of law is thoroughly well-established and there was no predicate for a writ of certiorari and, as we read the record, this contention is quite inapposite. If limited to the precise contract under the precise facts relevant, there would be a decision of no question of great public interest, and the writ should be disallowed.

Response of City to petitioner's Point IV, Br. p. 49:

"THE COMMISSION'S FINDINGS, THAT THE SERVICE AGREEMENTS HEREIN PROVIDED FOR A METHOD OF RATE CHANGE TO WHICH THE BUYERS CONSENTED, ARE CONCLUSIVE."

Our responses are:

1. Those above mentioned.

2. If the question here is simply one of contract law, the public interest assumed to be assigned has been misplaced.

3. If this was a question of fact as stated, Br. p. 49, then this case is not properly before this Court. We do not controvert the decision in *Henderson Bridge Company v. McGrath*, 134 U.S. 260, — L.ed. —, Br. p. 49. But that here at issue is the attempt of petitioner to integrate into a contract the provisions of Sections 4(d) and (e) when the parties have admeasured their rights advisedly and the City has not in any way, being entitled to a just and reasonable rate, assented to or been given an opportunity to consent to that done by United in its own uncontrolled discretion wherever the Commission may or may not at pleasure exert regulatory supervision. This is a contract case—not a regulation case.

4. Insofar as the City is concerned, the judgment in this case cannot be made controlling because the facts in the case, Nos. 23, 25 and 26, are absolutely different. It is demonstrable that there is not a scintilla of evidence to warrant the finding of the Commission. The City and Willmut would be accounted financially irresponsible if, being prejudiced against them as United was, they should have committed to United the power thus to control. Visualize a conscious collection of an excess of 50% for a seven-year period from the City and the consumers about Hattiesburg, under the claim that there could be no recovery under the State law (compare *Independent Linen Service Co. v. Stone*, *supra*), by reason of the fact that 1/40th of 1% of the gas thus consumed may have come from sources outside of Mississippi. Compare *United Gas*

*Pipe Line Co. v. Willmut Gas & Oil Co.*, — Miss. —, 97 So. 2d 530, certiorari denied — U.S. —, 2 L.ed. 2d 1550. There-through, this enormous loss was inflicted and its infliction was due to a misinterpretation by the Supreme Court of Mississippi of the decisions of this Court, which should, if potentially possible, be rectified herein.

5. Counsel say, Br. p. 50:

“\* \* \* The powers of the Commission to that end are great, extending even to the determination of what would be a just and reasonable rate, charge or contract in cases where the Commission after hearing has determined an existing contract affecting a rate to be unjust, unreasonable, unduly discriminatory, or preferential (§5 (a) of the Act). \* \* \*”

But counsel overlook the limitation made by the *Sierra Case*, where the parties have made a contract. There the rule is different and the gas company is not entitled to a just and reasonable return, but can only be protected when and if the public is to be protected, as phrased in the *Sierra Case* quoted.

6. The “refund procedure”, Br. p. 50, may be desirable, but where there is a contract precluding the filing of a new rate, the refund procedure is not in any way essential. Compare *Mobile* and *Sierra*. It is fundamentally erroneous to assume that this provision as to refund is requisite where the second rate assumed to be filed is unlawfully filed.

No one questions that an administrative determination in case of doubt demands recognition, but note *Marin v. United States*, 356 U.S. —, 2 L.ed. 2d 879; *Mobile* and *Sierra*. But where the interpretation of the administrative body is illegal, it is completely disregarded. *State v. Mutual Life Ins. Co.*, 189 Miss. 830, 196 So. 796, 800, where, as appears from the dissenting opinion, it was said:

"The second principle, and the facts are such that it ought to be controlling here, is that where the executive and administrative officers of the State charged with the execution and administration of a particular statute have for a long and unbroken period of time uniformly construed and administered it as not imposing the tax now lately claimed, and the same statute in the same or exactly similar language has been re-enacted long after the adoption of the departmental construction, the statute as re-enacted will be considered as having accepted that departmental construction as a part of the enactment. \* \* \*

None of the cases cited by petitioner are controlling contra.

Response of City to petitioner's Point V, Br. p. 54:

**"PROPER ANALYSIS OF THE NATURAL GAS ACT IN THE LIGHT OF THE MOBILE DECISION POINTS TO UTILIZATION OF §4 TO CONTROL RATE CHANGES AND THUS TO PROVIDE THE FLEXIBLE RATES INTENDED BY THE ACT."**

1. This precise point, as we interpret it, has been decided exactly contra to counsel's contention in *Mobile* thus, 100 L.ed. 386:

"\* \* \* The obvious implication is that, except as specifically limited by the Act, the ratemaking powers of natural gas companies were to be no different from those they would possess in the absence of the Act: to establish ex parte, and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer. No more is necessary to give full meaning to all the provisions of the Act: consistent with this, §4(d) means simply that no change—neither a unilateral change to an ex parte rate nor an agreed-upon change to a contract—can be made by a natural gas company without the proper notice to the Commission. \* \* \*

Where there is a contract, Federal jurisdiction does not attach, the import of the Act being primarily to enable the regulation of utilities through coordinate State and National action. *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 322 U.S. 507, 92 L.ed. 128, 139.

The right thus to contract between United and the representative of the City under the laws of the State of Mississippi is that right which should be preserved and not destroyed as it would be in virtue of the interpretation of petitioner whereby helpless consumers, having a valid contract, would be placed under the utility sought to be regulated to such an extent that if the Commission determined not to regulate, these parties would have no rights whatever to object; but if the Commission sought to suspend as to a certain segment of the rates, then the right upon these parties, including this City, is of such a character as that it cannot be efficiently and effectively asserted for the rectification of those entitled to protection. The remedy thus assumed to be given, being so incumbered, is worthless. *Ex parte Young, supra*.

2. We challenge the declaration, Br. p. 54:

"\* \* \* It assigned strange roles to the Commission, the natural gas companies and their customers, and destroyed the nice balancing of interest effected by the Regulations which had encouraged the recent extensive growth of the natural gas industry."

Read what happened to this City and Willmut, and then to envisage that they willingly conferred upon United that power effectually to destroy them is inconceivable.

3. Petitioner says the Commission intervenes when the customers cannot agree upon a new rate, Br. p. 54; but thus inconsistently assuming to assign to the Commission the position of an arbitrator, wherefore there can be no warrant under petitioner's contention.

4. One of the fundamental errors as to this reasoning, Br. p. 55, is that when there is this contract rate arrived at by a meeting of the minds, relief therefrom may not be otherwise than as in *Sierra* held. *Quoad* the terms of the contract, the power is surrendered otherwise than when meeting on equal terms, the company and the consumer may agree.

5. As to the protection of an industrial consumer, Br. p. 58, frankly, the company can protect itself just as effectively. When the seller may, substantially without let or hindrance, impetrate change in a contract and the vendee in that contract may not so do, but must needs pay the sum fixed by the seller, that is not a contract because there is no mutuality therein, the buyer being an absolute slave to the seller. The cost of a general rate investigation would preclude any relief. This one in Docket No. G-1142 has persisted longer than the Trojan War.

6. Counsel say, Br. p. 59:

"\* \* \* Whereas §4(e) correctly places the burden upon the natural gas company to justify the rate increase, the burden in a §5(a) proceeding would be on the Commission. To shift the burden to the Commission is wholly inconsistent with the legislative purpose, which is to protect the consumer."

But first when a rate is filed, the Commission must act, and if the consumer is protected by the imposition on him of the cost of a general rate hearing, very frankly, we do not desire such protection. The remedy is far worse than the disease.

7. The answer to all of these arguments, Br. p. 60, is that if the gas company wants regulation, let it be content with regulation; if it wants, additionally, to bind the ultimate consumer through the buyer by contract, it must pay

the price of being bound itself. Under regulation, each is equally protected. Under contract, let each be likewise equally protected. To visualize the necessity of a municipality like Hattiesburg having to go through the data filed by United when it sought these four rate advances to determine whether or not that sought was proper and appropriate would be prohibitory, for knowledge of accounting and of expert gas information are not kept in stock by the City, and such examination to determine the rightfulness and justness would be such a burden as that it could not be borne. Why not let the gas company, when it makes a contract, be bound by that contract? The United States, when it makes a contract, is bound by the contract and must needs perform. Though the Congress could pass the act as to debts applicable to others, yet when it came to dealing with the government itself, as a party bound, the Court refused it relief. Precisely here the gas company is doing that very thing. *Perry v. United States*, 294 U.S. 330, 79 L.ed. 912, 918.

Petitioner claims that "or any effective superseding schedules" may be integrated, but petitioner substantially confined itself to the attempt to integrate a specific price for specific gas. However, the contention of petitioner would require that these effective superseding schedules might contain other provisions than as to price, for example: (1) as to the time at which the contract would expire; or (2) the quality of the gas; or (3) the points of delivery; (4) the pressure; and (5) other provisions whereunder alienability might be restored. Under petitioner's contention, any new factor desired by petitioner could be integrated through the schedule, and when so integrated and filed, therethrough the contract would be altered, provided the Commission did not suspend. If it did suspend, then for the first time Willmut and the City would have

a right to question; but when petitioner is given the right thus to integrate a complete schedule into that schedule, he may transmute his desires as against the party of the other part into contractual provisions substantially without limitation; and that demonstrates that flexibility, so-called, though desirable by petitioner, is not desirable for respondent, for by becoming judge in his own case, those things integrated would be for his advantage and the destruction of the City.

### CONCLUSION.

Wherefore, upon behalf of the City and those purchasing gas under the protection of the contract, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed on all of the grounds there assigned; but, additionally, if petitioner's theory was adopted, with deference, there would be contravention of the Fifth Amendment that would require further proceedings in accordance with the judgment of this Court.

Respectfully submitted,

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## **APPENDIX "A".**

### **UNITED STATES OF AMERICA FEDERAL POWER COMMISSION**

#### **DECISION**

**In the Matter of Willmut Gas & Oil  
Company, et al.**

**v.**

**United Gas Pipe Line Company**

**Docket No. G-1158**

**Upon Formal Complaint for Relief from Rates  
Alleged to Be Unlawful**

**Francis L. Hall**

**Presiding Examiner**

**Date of Issuance: November 28, 1952**

#### **APPEARANCES**

**For Willmut Gas & Oil Company**

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**Garner W. Green, Jr., Esq.**

**James Simrall, Jr., Esq.**

**For the City of Hattiesburg, Mississippi**

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**For United Gas Pipe Line Company**

**C. Huffman Lewis, Esq.**

**W. Scott Wilkinson, Esq.**

**Vernon W. Woods, Esq.**

**W. O. Crain, Esq.**

**E. J. Freiberg, Esq.**

**For the Staff of the Federal Power Commission**

**Louis L. Da Pra, Esq.**

**Procedural Record****1948**

- Dec. 8** Formal complaint filed by Willmut Gas & Oil Company and City of Hattiesburg, Mississippi, against United Gas Pipe Line Company instituting proceeding in Docket No. G-1158.
- Dec. 15** Copy of formal complaint served upon United Gas Pipe Line Company.

**1949**

- Jan. 10** Answer to formal complaint filed by United Gas Pipe Line Company.
- Sept. 27** Order entered consolidating complaint proceeding in Docket No. G-1158 with the Commission's general rate investigation of United Gas Pipe Line Company in Docket No. G-1142.
- Oct. 4** Order issued September 27, 1950 published in Federal Register (14 FR 6049).

**1950**

- Nov. 29** Order entered consolidating proceedings in Docket Nos. G-1142 and G-1158 with show cause proceeding against United Gas Pipe Line Company in Docket No. G-1508 and fixing February 28, 1951 as date for commencement of consolidated hearing.
- Dec. 7** Notice of consolidated hearing published in Federal Register (15 FR 8684-85).

**1951**

- Feb. 1** Motion filed by counsel for the Federal Power Commission for continuance of hearing from February 28, 1951 to May 1, 1951.
- Feb. 8** United Gas Pipe Line Company filed answer consenting to continuance of hearing to May 1, 1951.
- Feb. 16** Secretary's notice of February 15, 1951 postponing hearing in consolidated proceedings from February 28, 1951 to May 1, 1951 served on all parties.

- Feb. 22** Secretary's notice of postponement of hearing in consolidated proceedings to May 1, 1951 published in Federal Register (16 FR 1776):
- April 17** Plea to jurisdiction of Commission filed by United Gas Pipe Line Company requesting that proceeding in Docket No. G-1158 be dismissed or suspended.
- April 20** Motion filed by United Gas Pipe Line Company requesting that the hearing scheduled to commence May 1, 1951 be postponed subject to further order of the Commission.
- April 24** Order entered postponing hearing in consolidated proceedings from May 1, 1951 to a date and place to be fixed by further order of the Commission.
- April 25** Telegrams opposing motion for further postponement of hearing filed by Willmut Gas & Oil Company and City of Hattiesburg, Mississippi.
- April 28** Order entered April 24, 1951 postponing hearing in consolidated proceedings published in Federal Register (16 FR 3673).
- 1952**
- April 15** Order entered severing complaint proceeding in Docket No. G-1158 from the proceedings in Docket Nos. G-1142 and G-1508 and fixing May 6, 1952 as date for commencement of hearing in Docket No. G-1158.
- April 23** Notice of severance and hearing in Docket No. G-1158 published in Federal Register (17 FR 3618-19).
- April 29** Francis L. Hall designated as Presiding Examiner.
- May 6-9** Public hearing held.
- June 20** Order issued by Presiding Examiner approving corrections to official transcript of hearing.

- June 25 Motion filed by Willmut Gas & Oil Company for extension of time within which to file main brief.
- June 27 Notice issued by Presiding Examiner extending time from June 27, 1952 to July 2, 1952 for filing of main brief by Willmut Gas & Oil Company.
- June 27 Main briefs filed by counsel for (1) United Gas Pipe Line Company, (2) City of Hattiesburg, Mississippi, and (3) the staff of the Federal Power Commission.
- July 2 Main brief filed by Willmut Gas & Oil Company.
- July 9 Request filed by United Gas Pipe Line Company for extension of time within which to file reply briefs.
- July 10 Notice issued by Presiding Examiner extending time for filing of reply briefs to July 30, 1952.
- July 28 Date of motion filed by United Gas Pipe Line Company for oral argument before Presiding Examiner on the matters involved and issues presented in Docket No. G-1158.
- July 30 Reply briefs filed.
- Aug. 27 Acting Secretary issued notice of oral argument before Presiding Examiner.
- Sept. 4 Notice of oral argument before Presiding Examiner published in Federal Register (17 FR 8027).
- Sept. 22 Oral argument held before Presiding Examiner. Certification of record of hearing filed herewith.

**HALL, PRESIDING EXAMINER:** This case arises out of the filing of a joint complaint by Willmut Gas & Oil Company (Willmut) and the City of Hattiesburg, Mississippi (Hattiesburg)<sup>1</sup> against United Gas Pipe Line Company (United). The complaint alleged that the price at which United sells gas to Willmut is in and of itself unjust and unreasonable and, in addition, unduly discriminatory and preferential. It was filed pursuant to the provisions of the Natural Gas Act, particularly Sections 4(b) and 5(a) thereof, and prayed that the Commission determine the just and reasonable rate for gas delivered by United to Willmut during the period from January 1, 1940, "until final hearing"; award reparations accordingly; and fix for the future a rate at which Willmut may purchase gas from United.

United's answer moved that the complaint be dismissed on the grounds that, with the exception of deliveries made in the community of East Jackson, Mississippi, "the natural gas delivered and sold to Willmut has been and is now wholly produced, transported and consumed within the State of Mississippi" and hence beyond the reach of the Natural Gas Act; that United's return is less than a just and reasonable return; that its deficiency in earnings will increase in subsequent years; and that the Commission is without authority under the Act to award reparations.

The controversy was precipitated in 1947 by United's action in granting Mississippi Power & Light Company (MPL)<sup>2</sup> a new gas purchase contract. That contract be-

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1. Hattiesburg is the principal city served by Willmut. It has a population in excess of 30,000.

2. By order dated March 11, 1952, *In the Matter of Mississippi Power & Light Company and Mississippi Valley Gas Company*, Docket No. G-1865, the Commission authorized and ap-

came effective on July 26, 1947, as United's Rate Schedule FPC No. 95, as supplemented, and provided for a substantial reduction in the price of gas (from 25¢ to 17.5¢ per Mcf) to be resold by MPL for domestic purposes in Jackson, Alta Woods, Clinton, Raymond, Bolton and Edwards, Mississippi. Willmut's service area adjoins that of MPL and extends from East Jackson (an unincorporated suburb of Jackson) south to Hattiesburg, a distance of approximately 85 miles. Knowing that as of July 26, 1947, MPL was the only customer of United in the Jackson rate area<sup>3</sup> enjoying reduced rates and other advantages, and that United and MPL were affiliated companies, and believing that United was continuing to serve it and MPL under substantially similar conditions, Willmut immediately demanded the same contract rates, terms and conditions given MPL. In an effort to settle the controversy, United offered to reduce Willmut's 25¢ rate to 17.5¢ per Mcf, effective July 26, 1947, on that portion of domestic gas delivered to Willmut at the East Jackson city gate, that offer being

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proved Mississippi Power & Light Company's sale of its natural gas facilities to Mississippi Valley Gas Company. The order in part recites:

\* \* \* Pursuant to a requirements contract between United Gas Pipe Line Company (United) and Power Company, dated August 5, 1947, and filed with the Commission on September 12, 1947, as FPC Rate Schedule 95, United delivers a part of Power Company's gas requirements for distribution in Jackson, including all of Power Company's gas requirements for use at its Rex Brown plant. After the proposed transfer, Power Company would assign the contract to Gas Company, and United has acquiesced in such assignment; Gas Company would sell gas to Power Company for the latter's Rex Brown plant requirements.

3. United's Jackson rate area extends from the Mississippi River east to Pensacola, Florida. It includes Jackson, Picayune, McComb, Columbia, Biloxi and Gulfport, Mississippi; Mobile, Alabama; Pensacola, Florida; and Bogalusa and Hammond, Louisiana, but does not embrace the New Orleans area.

based upon United's claim that it was then delivering interstate gas to Willmut only at East Jackson. United's limited offer was rejected by Willmut. The filing of the joint complaint followed.

The Commission, acting upon the suggestion of Willmut and Hattiesburg, in which United concurred, consolidated the complaint proceeding with the general rate investigation of United initiated on the Commission's own motion on October 12, 1948. Subsequently, the complaint proceeding was severed from the general rate investigation (and from a show cause proceeding with which it had also been consolidated) and the matter set for hearing.<sup>4</sup> The hearing was held on May 6, 7, 8 and 9, 1952, and after briefs were filed, the case was argued orally before the Presiding Examiner on September 22, 1952.

Severance of the complaint proceeding from the Commission's general rate investigation of United, together with the absence of a cost of service study, necessarily narrows

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4. By orders entered September 27, 1949 and November 29, 1950, the complaint proceeding at Docket No. G-1158 was consolidated with the general rate investigation of United at Docket No. G-1142 (which investigation is currently pending) and with a show cause proceeding against United at Docket No. G-1508.

By order entered April 24, 1951, the Commission, upon motion of United, postponed the hearing in the consolidated proceedings from May 1, 1951, to a date to be fixed by further order of the Commission.

In a subsequent order dated April 15, 1952, the Commission severed the complaint proceeding at Docket No. G-1158 from the matters involved at Docket Nos. G-1142 and G-1508 and gave the following explanation for its action: "In view of the long pendency of these matters and the impracticability of setting these consolidated matters down for hearing now, it appears advisable to the Commission, upon its own motion, to sever the proceeding at Docket No. G-1158 from the proceedings herein and to hold a separate hearing with respect to issues raised by the pleadings at Docket No. G-1158."

the complaint to a "discrimination case" as distinguished from a "rate case", with the questions to be decided being in general these: (1) Is United's sale to Willmut "in interstate commerce" so as to be subject to regulation under the Natural Gas Act? (2) Is United unduly discriminating against Willmut by charging MPL (now Mississippi Valley Gas Company)<sup>5</sup> a rate of 17.5¢ per Mcf for domestic gas while at the same time exacting a 25¢ rate for such gas from Willmut? (3) Does the Commission have power to award reparations? (4) If not, may the Commission make findings as to the lawfulness of past rates to be given effect in court proceedings, so that victims of violations of the Act may be provided with a remedy for recovery of the difference between the attacked rate and the Commission-fixed rate prescribed in lieu thereof.

Questions (3) and (4) deserve only passing notice. In the first place, the Natural Gas Act contains no provision for reparations (*Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 618; *Hope Natural Gas Co. v. Federal Power Commission*, 196 F. 2d 803, rehearing den. 197 F. 2d 522). That Act, approved June 21, 1938, was patterned on the Federal Power Act (Parts II and III) enacted in 1935, which likewise contained no provision for reparation awards (*Montana-Dakota Utilities Co. v. Northwest Public Service Co.*, 341 U.S. 246). In the second place, the contentions of counsel for Willmut, Hattiesburg and the Commission staff that the Commission has power to make findings as to the lawfulness of past rates are similar to those considered and rejected in *Hope Natural Gas Co. v. Federal Power Commission*, 134 F. 2d 287, re-

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5. Reference herein to "MPL" will indicate either Mississippi Power & Light Company or Mississippi Valley Gas Company depending on the period of time involved (see n. 2, p. A5, *supra*).

versed on other grounds,<sup>6</sup> and in the *Montana-Dakota* case which is controlling here.<sup>7</sup> In the latter case the Court declared (341 U.S. at pp. 251, 253-255):

"Petitioner \* \* \* can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.

\* \* \*

\* \* \* The majority believe the federal court should dismiss the complaint. A minority urges that we should direct the District Court to refer issues to the Federal Power Commission.

\* \* \*

\* \* \* But we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose. The fact that the Congress withheld from the Commission power to grant reparations does not require courts to entertain proceedings they cannot themselves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly. There is no indication in the Power Act that that was Congress' intent.

It is urged that this leaves petitioner without a remedy under the Power Act. We agree. In that respect, petitioner is no worse off after losing its lawsuit

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6. While the Government argued in the Supreme Court that the Commission had power to make findings as to the lawfulness of past rates, the Court found it unnecessary to decide the question in that case. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. at pp. 618-619.

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7. In the *Montana-Dakota* case the Commission filed its brief *amicus curiae* because the petition for certiorari raised questions important to the administration of the Federal Power Act, and by close analogy, the Natural Gas Act.

than its customers are if it wins. Unless we are to assume that this company failed to include its buying costs in its selling rates, we must assume that any unreasonable amounts it paid suppliers it collected from consumers. Indeed, this is the assumption made by the Commission in its brief as *amicus curiae* here. It is admitted that if it recoups again what it has already recouped from the public, there is no machinery in or out of court by which others who have paid unreasonable charges to it can recover.

Under such circumstances, we conclude that, since the case involves only issues which a federal court cannot decide and can only refer to a body which also would have no independent jurisdiction to decide, it must decline the case forthrightly rather than resort to such improvisation."

Respecting question (4) it is also to be observed that the delay in disposing of this case was in part due to the fact that at the outset the joint complaint was not limited to a discrimination case. In fact, Willmut and Hattiesburg expressly requested that the complaint be made a part of the Commission's general rate investigation of United in Docket No. G-1142—which is currently pending—with Willmut being treated "as an intervenor therein so that through investigation there may be vouchsafed Willmut and its customers that whereto they are lawfully entitled under the Act." United concurred in that request. The Commission complied therewith (p. A7, n. 4, *supra*).

Because the other two questions presented for decision may best be considered against a background of Willmut's history as a retail distributor of natural gas and its prior relations with United, that history will be reviewed first.

## History

In 1930, upon discovery of natural gas in the immediate vicinity of Jackson, Mississippi, an eight-inch pipe line, 84 miles in length, was constructed by Public Service Corporation of Mississippi from the Jackson gas field south to a point near Hattiesburg (Jackson-Hattiesburg line). Four years later, as a result of foreclosure proceedings, Willmut acquired the Jackson-Hattiesburg line and the distribution systems served by it, including those at D'Lo, Mendenhall, Magee, Sanford, Mt. Olive, Collins and Hattiesburg, Mississippi. Thereafter, Willmut acquired the distribution system at East Jackson and constructed a system at Seminary.

In 1939 the Jackson gas field, upon which Willmut's system depended,<sup>8</sup> was substantially depleted, making it necessary for Willmut to seek a supply of gas from another source. Because United's system served the Jackson area and appeared to have a plentiful supply of natural gas, Willmut turned to it for its requirements. However, when United and Willmut were unable to agree upon contract terms, Willmut, without United's consent, connected the northern end of its Jackson-Hattiesburg line to United's Sterlington (La.)-Jackson line, and by that means United began supplying Willmut's requirements with gas produced outside the State of Mississippi.<sup>9</sup> Without contract that

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8. Until 1940 Willmut operated its system with gas produced by it and others in the Jackson field. The cost at wellhead was approximately 2 to 4 cents per Mcf as compared with the 30¢ domestic gas rate Willmut began paying United in 1940.

9. No reason appears why it was necessary for Willmut to obtain its natural gas requirements at the outset in the indicated manner. Apparently the same result could have been obtained without delay by application filed pursuant to Section 7(a) of the Natural Gas Act.

service continued until August 20, 1943. The domestic rate was then 30¢ per Mcf (United's uniform town border rate in the Jackson rate area), with a participation by United in the gross revenue received by Willmut for industrial gas—usually approximating 80%.

From the time Willmut attached its Jackson-Hattiesburg line to United's system in 1940 until the present, strained relations have existed between Willmut and United.<sup>10</sup> Another dispute developed because Willmut, upon receipt of gas from United, transported it at its own expense to the city gates along its 84-mile line. It therefore objected to the payment of a city gate rate without corresponding city gate delivery. Willmut obtained no immediate relief. However, in 1943, in accordance with a certificate of public convenience and necessity issued it by the Commission (*In the Matter of United Gas Pipe Line Co.*, Docket No. G-478, 3 F.P.C. 551), United purchased the Jackson-Hattiesburg line from Willmut and began operating that line as an integral part of its interstate system.<sup>11</sup> Willmut, however, retained and has continued to

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10. Regarding the inharmonious relations which have existed between Willmut and United, as well as the sharp competition between Willmut and affiliates of United, it should be observed that the testimony of Willmut's president that "United was desirous of eliminating Willmut" stands unchallenged in the record.

11. In its opinion the Commission stated in part (3 F.P.C. at pp. 551-552, 554):

This proceeding was begun by the filing of an application by United \* \* \* for authority \* \* \* to acquire from Willmut \* \* \* and operate a gas transmission pipe line for the transportation and sale for resale of natural gas in interstate commerce, and also to construct and operate about 4.4 miles of 8 5/8 inch pipe line to connect the southern terminus of the transmission line to be acquired with the applicant's existing Jackson-Mobile interstate transmission line. The transmission line to be acquired parallels throughout its length applicant's Jackson-Mobile line.

operate its local distribution systems served by that line and also the East Jackson distribution system served by the Sterlington-Jackson line.

Contemporaneously with its acquisition of the Jackson-Hattiesburg line in 1943, and as a part of the transaction, United for the first time entered into a contract with Willmut under which it agreed to sell to the latter substantially all of its natural gas requirements and to make delivery at the city gate of each of the several cities and towns served by Willmut. By order of the Commission, this contract became effective as of August 20, 1943, as United Rate Schedule FPC No. 73, and Willmut continues to be served thereunder. Under that contract the domestic rate is 25¢ per Mcf,<sup>12</sup> that being the uniform rate which the Commission had, in its prior opinion and order of April 16, 1943, in *Louisiana Public Service Commission v. United Gas Pipe Line Co.*, 3 FPC 402, fixed for United's Jackson district, including MPL.<sup>13</sup>

Until 1947 all of United's customers in the Jackson rate area were served domestic gas at the 25¢ rate. However,

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The interconnection at both ends of the Willmut line with the Jackson-Mobile line will not only enable the applicant to operate the same as a partial looping of the Jackson-Mobile line, but will also permit applicant to make future city gate deliveries of natural gas at a saving to Willmut. \* \* \*

12. The contract further provided that the price for all gas delivered for resale to industrial customers would be 80% of the amount received by Willmut therefor, provided that United received for the industrial gas not more than 25¢ per Mcf nor less than 16¢ per Mcf. The floor for industrial gas for Willmut, i.e., 16¢ per Mcf, compares with a 14¢ floor in the new MPL contract.

13. The Commission's opinion and order reduced United's rate, on an area basis, by \$2,195,287, as proposed and agreed to by United, the effect in the Jackson rate area being to reduce United's domestic rate from 30¢ to 25¢ per Mcf.

beginning July 26, 1947, only MPL enjoyed the benefits of a lower rate, causing Willmut and Hattiesburg, after United's rejection of Willmut's demand for rates and service equal to MPL, to file the formal complaint on December 8, 1948, instituting this proceeding.

### **Jurisdiction**

As already indicated, Willmut is a retail distributor of natural gas in south Mississippi. Since 1940 it has been dependent upon United for practically its entire natural gas supply. United is a corporation having its principal business office at Shreveport, Louisiana. It owns and operates an integrated natural gas transmission pipe-line system which traverses the states of Texas, Louisiana, Mississippi, Alabama and Florida. By the operation of that system United is engaged in the transportation and sale of natural gas in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial and other uses, and admittedly is a "natural-gas company" within the meaning of the Natural Gas Act, and subject thereunder to regulation by the Commission.

Except for East Jackson (served by the Sterlington-Jackson interstate line) all of United's natural gas deliveries to Willmut are made at town border stations served by the Jackson-Hattiesburg line. But although the sale to Willmut continues to be made through the use of these facilities certificated by the Commission for both the "transportation" and "sale" of natural gas in interstate commerce, and under a filed rate schedule effective since August 20, 1943, United contends that beginning February 6, 1947, such sale, except for East Jackson, should be found to be an intrastate sale and hence beyond the jurisdiction of the Commission to regulate.

United says that, except for East Jackson, its sale to Willmut is entitled to exemption from Commission regulation for the reason that after the discovery of gas in 1946 in the Gwinville field in Mississippi it substituted intra-state gas from that source for interstate deliveries made to the Jackson-Hattiesburg line up to that time, alleging that that result was accomplished by the operational changes now to be described.

The Gwinville field is located at a point approximately midway between Jackson and Hattiesburg. By means of a transmission line certificated by the Commission (5 FPC 628), that field was tied into the Jackson-Hattiesburg line on January 8, 1947, having been previously tied into the paralleling Jackson-Mobile line on December 27, 1946. The check valve connections were so constructed that interstate gas cannot flow from the Jackson-Mobile line into the Jackson-Hattiesburg line without the check valves having been first unlocked and then opened. These valves have not been so unlocked and opened and thus no interstate gas has flowed from the Jackson-Mobile line into the Jackson-Hattiesburg line at this point since December 27, 1946. However, since that date there has been a constant flow of gas from the Gwinville field to the Jackson-Hattiesburg line and beyond to the Jackson-Mobile line, such flow to the Jackson-Mobile line being provided for not only by the Gwinville tie line but also by an 8-inch line connecting the southern terminus of the Jackson-Hattiesburg line with the Jackson-Mobile line. By this means gas produced in the Gwinville field enters United's interstate system, particularly lines extending into Alabama and Florida.

At the time the Gwinville field was tied into the Jackson-Hattiesburg and Jackson-Mobile lines, the Jackson-Hattiesburg line serving Willmut was interconnected

with three other interstate transmission lines owned and operated by United: (1) the Jackson-Mobile parallel line at two points in addition to the Gwinville tap;<sup>14</sup> (2) the Sterlington-Jackson line at two points; and (3) a 10-inch line extending to Bogalusa, Louisiana, which in turn is interconnected with the Jackson-Mobile line. These four lines and their connecting links were certificated by the Commission for both the "transportation" and "sale" of natural gas in interstate commerce, and as certificated were operated to transmit, coordinate and distribute natural gas in such manner and in such volume as to insure continuity of service, maximum economic stability and adequate pressure throughout that division of United's system. However, after being certificated and in disregard not only of what appears to have been its concept of efficient operating standards, but also of the rights of the public, to whom it owes its first duty, United, in January and February, 1947, without applying for and obtaining Commission consent pursuant to the abandonment provision of the Natural Gas Act (Section 7(b)), isolated the Jackson-Hattiesburg line from (1) the Sterlington-Jackson line and (2) the 10-inch Bogalusa line.

United also caused installations to be made, again without Commission approval, rendering impossible any

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14. The north end connection between the Jackson-Hattiesburg line and the Jackson-Mobile line was at the Jackson compressor station and was made by Willmut in 1940 when it commenced to take gas from United. From 1943 until United rearranged its facilities at that point in 1947, that connection constituted part of the Jackson-Hattiesburg - Jackson-Mobile loop arrangement authorized at Docket No. G-478 (pp. A12-A13, n. 11, *supra*).

It is also important to note at this point that the Jackson-Hattiesburg, Jackson-Mobile and Sterlington-Jackson lines all extended to United's Jackson compressor station until United rearranged its system operations so as to disconnect the Jackson-Hattiesburg line from that compressor station.

flow of interstate gas from the Jackson-Mobile line into the Jackson-Hattiesburg line except for the 8-inch line authorized at Docket No. G-478 to connect the southern terminus of the Jackson-Hattiesburg line with the Jackson-Mobile line (pp. A12-A13, n. 11, *supra*). Off that 8-inch tie line United constructed a lateral (Plant Eaton lateral) to provide service to Mississippi Power Company's steam generating station (Plant Eaton) located approximately one mile outside the Hattiesburg city limits. Service to Plant Eaton<sup>15</sup> is, therefore, provided from gas originating both from within (from the Jackson-Hattiesburg line) and from without (from the Jackson-Mobile line) the State of Mississippi. By installing two meters, one on the Plant Eaton lateral at the steam generating plant, and the other on the 8-inch link at a point east of its junction with the Plant Eaton lateral, United, by a comparison of the flow of gas through the two meters, is enabled to determine when interstate gas flows from the Jackson-Mobile line into the Jackson-Hattiesburg line, and likewise when the flow is in the opposite direction. So long as a comparison of the meter charts show that Plant Eaton consumed a larger quantity of gas than passed through

15. The sale of gas to Mississippi Power Company for consumption at Plant Eaton is a direct industrial sale. The rate charged is 12.46¢ per Mcf. That plant consumes gas at an almost uniform rate twenty-four hours a day, as reflected, for example, by the fact that in the year 1951 United delivered to it 7,324,389 Mcf of gas which was consumed at a load factor of 90.5%. Deliveries to that steam generating plant are, however, curtailable before deliveries to town border stations such as Willmut. But in the event gas service is interrupted, United, by the terms of its contract with Mississippi Power Company, is obligated to supply (for two units) the alternative fuel requirements of the steam generating plant so as to enable it to maintain continuity of operation. In fact, by the terms of the service contract, United was also obligated to construct the alternative fuel facilities for two units at its own expense.

the meter on the 8-inch tie line, it follows necessarily that the remaining portion of the gas came from the Jackson-Hattiesburg line and that no interstate gas flowed from the 8-inch tie line into the Jackson-Hattiesburg line.

According to the testimony, from February 6, 1947 to April 22, 1952, gas flowed from the Jackson-Mobile line to the Jackson-Hattiesburg line on seven occasions, each of a few hours duration. On five of those occasions natural gas was required from the Jackson-Mobile line because of repairs on the Jackson-Hattiesburg line. On another occasion, United required large volumes of gas to pack its newly constructed Philadelphia extension. On only one occasion, i.e., December 25, 1948, did gas flow automatically from the Jackson-Mobile line into the Jackson-Hattiesburg line because of temperature, pressure and operating conditions. However, at any time the pressure in the Jackson-Hattiesburg line falls below the pressure in the Jackson-Mobile line, interstate gas will automatically flow from the Jackson-Mobile line into the Jackson-Hattiesburg line. It is obvious, therefore, that the Jackson-Hattiesburg line serves two essential functions in United's interconnected and coordinated pipe line network. First, it provides a means by which continuous and adequate natural gas service is automatically assured all delivery points on that line, regardless of whether the gas is produced within or without the State of Mississippi. Second, it transports gas originating in the Gwinville field to the Jackson-Mobile line for further transportation to other points on United's integrated system.

In passing, it should be pointed out that the fact that interstate gas has flowed from the Jackson-Mobile line to the Jackson-Hattiesburg line on only a few occasions since February 6, 1947, does not mean that the same condition will necessarily prevail in the future. Indeed, because of

the steadily increasing demand for gas at delivery points on the Jackson-Hattiesburg line,<sup>16</sup> there is every reason to believe that in the future far greater volumes of interstate gas will flow into the Jackson-Hattiesburg line even if the present system operating arrangement is permitted to continue. A clear indication of the anticipated shortage of intrastate gas on the Jackson-Hattiesburg line is the installation of alternative fuel at Plant Eaton (p. A17, n. 15, *supra*.)

United concedes that until February 6, 1947 the sale made to Willmut from the Jackson-Hattiesburg line was regulable by the Commission. Although it challenges the jurisdiction of the Commission over such sale since that date, the evidence, provisions of the Natural Gas Act, and applicable decisions of the courts and the Commission make it clear that that sale is not removed from Commission jurisdiction by the circumstances under which it is now made. This is so for two principal reasons: First, the system operational changes were made in violation of the provisions of Section 7(b) of the Act which prohibit United from abandoning "all or any portion of its facilities subject to the jurisdiction of the Commission" without Commission approval. Second, even if the abandonment of facilities had been authorized, United has not succeeded, as it claims, in removing sales from the Jackson-Hattiesburg line from the reach of the Act because (1) the relatively small amount of interstate gas involved since February 6, 1947 is no bar to Commission regulation, and (2)

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16. In their reply brief counsel for United state that "deliveries to Willmut over the years 1947 to 1951 have increased by some 51% in annual volume and by some 80% in peak day." Moreover, any reduction in Willmut's wholesale rate will have a tendency to further increase the demand for gas from the Jackson-Hattiesburg line.

the present plan of operation for the Jackson-Hattiesburg line shows that it is not to be regarded as an isolated segment, separate and distinct from United's transmission network, but rather is an integral part thereof.

# I.

The Natural Gas Act, in vesting jurisdiction in the Commission to grant certificates of public convenience and necessity and to permit abandonments of "facilities" and "any service", does not create power in a natural-gas company to make elections as to the type of service it will render or as to the method of its system operations, but only confers jurisdiction upon the Commission to give authorizations satisfying the Act's limiting provisions and effectuating its fundamental purpose to protect ultimate consumers served by certificated facilities. That it was the intention of Congress to rely upon exclusive Commission control is made apparent by the provisions of Section 7(e) providing that certificates may be issued by the Commission only if it finds—

\* \* \* that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

and by Section 7(b) prohibiting a natural-gas company from abandoning—

\* \* \* all or any portion of its facilities subject to the jurisdiction of the Commission or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

Thus once a company becomes an interstate operator pursuant to a certificate of public convenience and necessity issued by the Commission, it may not become an intrastate operator except through the operation of the abandonment provisions of Section 7(b). United has never instituted a proceeding under Section 7(b) for the purpose of establishing either statutory prerequisite (that (1) its available natural gas supply is depleted, or (2) that the present or future public convenience and necessity permit the abandonment of "facilities" or "any service")<sup>17</sup> for the abandonment of interstate service to Willmut, or for abandonment of facilities involved in the rearrangement of its system operations in 1947. Nor has the Commission ever made or had occasion to make the findings which Section 7(b) require as the basis for Commission approval.

Thus United's rearrangement of its system operations in 1947, without Commission sanction, and in an effort to avoid Commission regulation of the Willmut rate (insofar

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17. See *Panhandle Eastern Pipe Line Co. v. Michigan Consolidated Gas Co.*, 177 F.2d 942; *Panhandle Eastern Pipe Line Co.*, Docket No. G-1725, Memorandum Opp. No. 229, dated June 17, 1952; *United Gas Pipe Line Co.*, Docket No. G-216, 3 F.P.C. 3, 9.

as deliveries made from the Jackson-Hattiesburg line are concerned), is a clear violation of the Act and may be corrected by order of the Commission directing the reestablishment of system operations existing prior to February 6, 1947.<sup>18</sup> That the procedure made mandatory by the statute is the only course open to United is made clear in *Pennsylvania Water & Power Co. v. Federal Power Commission*, 343 U.S. 414, 423-424, as appears from the following excerpt from that opinion which applies with equal force to the situation here involved:

If Penn Water wishes to discontinue some or all of the services it has rendered for the past twenty years, the Act \* \* \* opens up a way *provided Penn Water can prove that its wishes are consistent with the public interest.* \* \* \* Here instead of following the procedure for changing existing services and practices—a procedure which the Congress has authorized and which the Commission has supplemented by rules of its own, the company has rather tried to utilize a *violation* \* \* \* so as to nullify a rate-reduction order.

Accordingly, even if United's rearrangement of its system operations had accomplished a complete substitution of intrastate for interstate deliveries from the Jackson-Hattiesburg line, such unauthorized rearrangement of its system can avail it nothing in this case.

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18. Power to take such action is granted by the provisions of Section 16 of the Natural Gas Act authorizing the Commission to perform any act and to issue any order it may find necessary or appropriate to carry out the provisions of the Act.

From the testimony it appears that all of the unauthorized installations, disconnections, etc., made by United can be reestablished in a matter of hours and at a minimum of expense.

## II.

It is clear, however, that United, notwithstanding the operational changes made, has not succeeded in removing any part of its sale to Willmut from Commission regulation. It serves Willmut under a single contract effective as a rate schedule since August 20, 1943; the service provided under that contract is considered as one bulk sale; the deliveries made at East Jackson from the Sterlington-Jackson line are comprised of interstate gas; and the deliveries from the Jackson-Hattiesburg line since February 6, 1947, have involved relatively small amounts of interstate gas, but may at any time involve much larger volumes of interstate gas by the automatic operation of United's system. In such a situation, control of United's rate to Willmut is a matter with which Congress alone is competent to deal, and is one over which the Commission has regulatory power under the Natural Gas Act.

United's objection to Commission regulation of the Willmut rate because of the small amount of interstate gas involved since February 6, 1947 is a familiar one, having been raised in some form in practically every proceeding in which the Commission's jurisdiction has been contested. Representative of the rulings of the courts are the four most recent decisions involving instances where the Commission asserted jurisdiction in the face of objections of the kind upon which United appears to rely (*Pennsylvania Water & Power Co. v. Federal Power Commission*, *supra*; *Wisconsin Power and Light Co. v. Federal Power Commission*, \_\_\_\_ F.2d \_\_\_\_ (Ct. of App., D.C., November 13, 1952); *California Electric Power Co. v. Federal Power Commission*, \_\_\_\_ F.2d \_\_\_\_ (9th Cir., October 14, 1952); *Wisconsin-Michigan Power Co. v. Federal Power Commission*, 197 F.2d 472). In the *Pennsylvania Water & Power Company* case the Supreme Court held that despite

the fact that about 83% of the energy furnished by the company to customers in Pennsylvania was generated in Pennsylvania, the "Commission has complete authority to regulate all of this commingled power flow. *The Commission's power does not vary with the rise and fall of the Susquehanna River.*" (343 U.S. at p. 420). This ruling is particularly pertinent here, for by the same token the Commission's jurisdiction over United's sale to Willmut from the Jackson-Hattiesburg line does not vary with the unpredictable rise and fall of pressure on that line, nor does it vary by reason of the unauthorized acts of United in making operational changes.

That the relatively small amounts of interstate gas which may at times be involved is no ground for objection is also made clear by the decision in *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U.S. 515. In that case the Court, while setting aside the Commission's order on other grounds, ruled at pp. 535-536:

Another contention made by the Company may be shortly disposed of. It is contended that the volume of energy passing over certain of these facilities is insignificant in proportion to the total. Only about one-fifth of one percent of all the energy received and generated by the Company throughout the State of Connecticut was transmitted out of the state during the time of the connection of Fishers Islands with the Borough of Groton. Congress appears to have left to the Commission's sound administrative discretion to determine whether or not to assert its authority in such situations. Congress annually receives a report of the Commission's work and appropriates the funds for its continuance. If it thinks the Commission is over-extending its attention to trivial situations it has ready means of control in its hands. The wisdom of its work is not our concern, but only its legal justification. *We do not find that Congress has conditioned the*

*jurisdiction of the Commission upon any particular volumes or proportion of interstate energy involved, and we do not think it would be appropriate to supply such a jurisdictional limitation by construction.*

Even on the basis of present system operations, the situation here justifying Commission assertion of jurisdiction over United's sale to Willmut from the Jackson-Hattiesburg line is by no means a "trivial" one, for as has been shown the present plan of operation for the Jackson-Hattiesburg line is to have it serve as a necessary and coordinated part of United's interstate system and it can at any time, by the automatic operation of that system, receive large volumes of interstate gas from the Jackson-Mobile line.

### **Preference and Discrimination**

That MPL was granted a preferential and discriminatory rate was tacitly conceded by United during the 1947-1948 negotiations in which Willmut demanded rates, terms and conditions equal to these provided in MPL's service contract which became effective on July 26, 1947, as United's Rate Schedule FPC No. 95, as supplemented. For as has been stated (pp. A5-A7, *supra*). United attempted to settle that controversy by offering Willmut MPL's 17.5¢ domestic rate on deliveries made at East Jackson from the Sterlington-Jackson line, its position as to deliveries then made from the Jackson-Hattiesburg line being simply that such deliveries are comprised of intrastate gas beyond the reach of the Natural Gas Act. Thus United tacitly conceded that if Commission jurisdiction extended to deliveries made from the Jackson-Hattiesburg line, as hereinabove shown, the 17.5¢ rate per Mcf for domestic gas was likewise applicable to those deliveries.

In considering the question of preference and discrimination here involved, it is also important to note at this

point that during the hearing in 1943 *In the Matter of United Gas Pipe Line Co.*, Docket No. G-478, *supra*, a witness for United, in testifying as to the reason why United, prior to 1943, could not offer Willmut a rate lower than the uniform 30¢ per Mcf rate for domestic gas (when Willmut objected to paying a city gate price without corresponding city gate delivery (p. A12, *supra*)), stated:

\* \* \* if we attempted to give him some reduction in our city gate price \* \* \* we would be in the position of selling him gas at a lesser rate about a stone's throw from where we would be delivering it to the Mississippi Power and Light at Jackson, Mississippi for the established city gate rate, *the reasons for that being we are operating the system on zone rates, and the mileage factor is not a direct complication of the rate* \* \* \*.

In so testifying United's representative recognized that United's operation on a uniform rate area basis entitled town border customers within established zones to equal rates. And as United's rate expert (Zinder) testified, in determining the town border customers to be included in a uniform rate area the customers need not "have exactly the same load factor, exactly the same volume, exactly the same distance from supply to get the same rate. In the averaging process \* \* \* there may be differences. The purpose of averaging is to remove such differences within a reasonable range." Thus where, as here, uniform rate zones are established and maintained within a reasonable range so that the public interest, i.e., that of investors and consumers, is protected, there can be no objection to the zone method of operation and regulation. Certainly it would not appear to be of any moment to a natural-gas company, so long as it earns a fair return, if all of its customers within an established zone pay a uniform rate rather than different rates producing the same aggregate revenue.

That United operates and has been regulated by the Commission on a rate area basis is shown by the Commission's opinion and order adopted April 16, 1943 (a few months prior to the date Willmut entered into its gas purchase contract with United (Rate Schedule FPC No. 73)) reducing United's rates, on a zone basis, by \$2,195,287 as proposed and agreed to by United (*Louisiana Public Service Commission v. United Gas Pipe Line Co., supra*). In so doing, the Commission reduced United's uniform rate for domestic gas in the Jackson rate area from 30¢ to 25¢, stating in part as follows (3 FPC at pp. 402-405):

These proceedings had their inception with the filing of a complaint by the Louisiana Public Service Commission against United \* \* \*

On December 5, 1939, the Commission, acting on its own motion, entered an order \* \* \* instituting a general investigation of United \* \* \*. Subsequently, the cities of Jackson, Hattiesburg, and New Orleans, and Willmut \* \* \* filed petitions \* \* \* to intervene \* \* \*

\* \* \*

\* \* \* United agreed to file, and on April 1, 1943, did file with the Commission amendatory contracts affecting a reduction of rates for resale gas, for domestic and commercial consumption in the sum of \$2,195,287, annually, based upon revenues for the year 1942. \* \* \*

We have accepted for filing the rate schedules submitted by United, and \* \* \* make them applicable to sales and deliveries of natural gas \* \* \*.

\* \* \*

The over-all reduction of \$2,195,287.00 has been allocated to "rate areas" in accordance with the Commission's established policy of endeavoring to obtain uniform rates to the widest extent feasible. In determining areas where uniform rates should prevail,

consideration is given to the relative cost of rendering service, the location of gas fields, natural boundaries, and the general characteristics of the region. In other words, our purpose is to encourage the establishment of uniform rates in regions where substantially the same operating and natural conditions prevail, starting with the premise that the widest areas practicable in terms of average costs and physical characteristics of service, should be designated.

In accordance with these principles, for the purpose of allocating the over-all rate reduction, the territory of the company was divided into 7 rate areas

*Jackson Area.*—From the Mississippi River east to Pensacola, Florida, but not including the New Orleans area. The Jackson area includes Jackson, Mississippi; Mobile, Alabama; and Pensacola, Florida.

The following tabulation shows the rates per Mcf in each area prior to and after the rate reduction.

Area	Old rates cents	New rates cents
San Antonio area	30	22
Wichita Falls area	27	25
Jackson area	30	25
Central area	30-27-22½	19
Houston area	20	15
Beaumont area	20	15
New Orleans area	30-15.4	15

It will be noted that the new rate for Houston, Beaumont, and New Orleans is 15 cents, which is considerably lower than the rates for the other areas. This lower rate is due solely to the very close proximity of each of these areas to the sources of natural gas.

Counsel for United now claim that (1) with respect to East Jackson, and assuming that the Commission has jurisdiction over sales to Willmut in addition to East Jackson, the complainants have not borne the burden of proving the existence of discrimination claimed by them, and (2) assuming further that discrimination might be found to exist, the Commission is powerless to act until it has concluded a complete rate case.

### I.

In contending that Willmut and Hattiesburg had the burden of proof of establishing the existence of discrimination claimed by them, counsel for United ignore the fact that United operates on a uniform rate area basis and not on an individual customer basis. To ignore this fact shows how seriously counsel misconstrue the problem of preference and discrimination here involved. For to operate on a zone basis and to have the Commission exercise its rate jurisdiction on such a basis is to make the uniform zone rate binding for all regulatory purposes.

Willmut and Hattiesburg met the burden of proof *prima facie* by simply showing that Willmut is a town border customer within United's established Jackson rate area. This fact entitled Willmut (and the same is true of all other town border customers in United's Jackson district) to service on the same basis as MPL unless United discharges its burden of proof of making it affirmatively appear that substantial differences exist justifying the exclusion of MPL from the uniform rate applicable to all other customers in the Jackson rate zone. United made no such showing. Nothing in the record tends to indicate that the cost per Mcf to United of producing and delivering domestic gas to customers in the Jackson rate area, other than MPL, is more than the cost of producing and

delivering domestic gas to MPL. Nor was any substantial showing made (1) that such differences as may have existed since 1947 in population, load factor,<sup>19</sup> etc., furnish any basis for treating MPL any differently than the other town border customers within the Jackson rate area, or (2) that such immaterial differences as may have existed and as may continue to exist are in any way accountable for the 1947 rate reduction which United voluntarily granted to MPL. In fact, none of the witnesses presented by United knew what caused that rate reduction to be made. As United's Assistant Sales Manager (Porter) testified, the negotiations leading to the reduction of the MPL rate were not even conducted by the sales department, but "were carried on between the top management of our company and the top management" of MPL. However, none of the individuals comprising the "top management" of either United or MPL were produced as witnesses. Respecting this, and as the Court observed in *Runkle v. Burnham*, 153 U.S. 216, 225-226, "production of weaker evidence, when stronger might have been produced, lays the producer open to the suspicion that the stronger evidence would have been to his prejudice."

That there can be no doubt but that United, at the time it granted MPL the 17.5¢ per Mcf rate for domestic gas in 1947, recognized that it served MPL and all other town border customers in the Jackson rate area under substantially similar conditions, and that the new MPL rate was lower than the other rates for similar service in that territory, is shown by the fact that in its letter dated Sep-

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19. At one point in his testimony United's witness Porter testified:

Q. \* \* \* Do you have any reason, or is there any reason why the domestic load factor of Willmut should be any different from the domestic load factor at Jackson?

A. I shouldn't think so. I don't know.

tember 9, 1947, transmitting the new MPL contract to the Commission for filing (which letter was offered in evidence by Commission staff counsel), it was expressly stated that the new MPL rate *"is lower than our other rates for similar service in the same territory."* This transmittal letter is further referred to hereinafter in connection with the discussion of the error into which the Commission was led in relying upon representations made in support of reasons advanced by United for acceptance of the new MPL contract for filing as a rate schedule.

From the foregoing it can only be concluded that Willmut and MPL, from and after the date the new MPL contract became effective (as United's Rate Schedule FPC No. 95, as supplemented), have continued to be served under substantially similar conditions, and that the record discloses no justification for the higher, or 25¢ per Mcf domestic rate, which United charges Willmut. Thus United, by its failure to make available to Willmut, as well as all other town border customers within the Jackson rate area, the lowest rate voluntarily charged MPL, is unlawfully subjecting the other customers in that rate area to undue prejudice and disadvantage and granting preference and advantage to MPL.

Turning now to a consideration of the error into which the Commission was led in its reliance upon United's stated justification for requesting that the new MPL contract be permitted to become effective as a rate schedule. In transmitting (by letter dated September 4, 1947) that contract for filing, United, in undertaking to comply with the Commission's Rules of Practice and Procedure, set forth the following reasons in support of the proposed new rate:

\* \* \* The change in rate \* \* \* is due to the fact that in the State of Mississippi there has been almost

continual campaign of exploratory drilling operations, which have resulted in the discovery of several gas fields in or near the area covered by the above contract, which fields were not known at the time of the execution of the original contract. Some of these fields presently have no market outlet, and it is the desire of this Company to afford reasonable market outlets for these fields where it can economically do so; and likewise to pass on to towns and cities in the State of Mississippi benefits in the way of rate reductions resulting from the new and comparatively close sources of gas supply where the economics of the situation can justify the same.

But it was Willmut, not MPL, that was then receiving predominantly intrastate gas. In fact, so far as the record shows, United continues to supply MPL with predominantly out-of-state gas produced in Texas and Louisiana. But rather than give Willmut "benefits in the way of rate reductions resulting from new and comparatively close sources of gas supply," United took the unauthorized steps hereinabove described (pp. A16-A17, *supra*) to make operational changes designed to remove the sale to Willmut (insofar as made from the Jackson-Hattiesburg line) from the Commission's jurisdiction, and presumably by that means among other things, to protect the discriminatory rate and preference voluntarily extended to MPL. It is also of interest to point out that about that time United constructed its so-called "Philadelphia extension" to the Jackson Hattiesburg line, which extension begins at United's Jackson, Mississippi, compressor station and continues in an easterly direction to Philadelphia, Mississippi, a distance of about 80 miles. The Philadelphia extension was the subject of United's application for a certificate in Docket No. G-708 which was withdrawn after filing. However, before that extension was isolated from United's interstate system and began receiving intrastate gas from the Gwin

ville field, it was (on April 17, 1947) packed with the aid of interstate gas delivered through the Jackson-Hattiesburg line (from the Jackson-Mobile line). The customers served by the Philadelphia extension of the Jackson-Hattiesburg line have been charged 47¢ per Mcf for intrastate gas, as compared with the 17.5¢ rate charged MPL for interstate gas and the 25¢ rate charged Willmut and all other town border customers within the Jackson rate area. Nothing in these actions appear to substantiate what the Commission was led to believe in accepting the new MPL rate schedule for filing. In fact the evidence is to the contrary. Had the Commission at the time been fully and properly informed as to all the pertinent facts, there is no question but that it would have either rejected the new rate filing as presented, or caused it to be extended to all town border customers within the Jackson zone. As to the "Philadelphia extension", the Commission may now want to reconsider its action in permitting withdrawal of the certificate application therefor, particularly if it directs the reestablishment of prior systems operations (at United's Jackson, Mississippi, compressor station) which it has authority to order (n. 18, p. A22, *supra*).<sup>20</sup>

There appears to be no escape from the conclusion that the treatment which Willmut has received at the hands of United is nothing more than an attempted squeeze play designed either to force Willmut out of the retail gas

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20. As United's witness Poindexter testified, before United would let the towns served by the Philadelphia extension "suffer for lack of gas supply, we would take any necessary measures, including the introduction of interstate gas into the line for such limited period as might be required in order to insure a supply to the towns affected. That has been demonstrated by what we have done down here for Hattiesburg, when we have had occasion to make repairs to the south end of the 8-inch Jackson-Hattiesburg line."

business, or to cause it to maintain a high level of retail rates so as to furnish justification for the maintenance by United's parent corporation, United Gas Corporation, of its level of rates in adjacent areas in the Jackson rate zone, as well as to cause other customers of United in that area to maintain their level of rates.<sup>21</sup>

It was the prevalence of such practice in the natural gas field, among others, which gave rise to an insistent demand for federal regulation resulting in the enactment of the Natural Gas Act. This was made clear in *Federal Power Commission v. Hope Natural Gas Co.*, *supra*, where the Court stated (320 U.S. at p. 610):

The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies. \* \* \* Moreover, the investigations of the Federal Trade Commission had disclosed that the majority of the pipe-line mileage in the country used to transport natural gas, together with an increasing percentage of natural gas supply for pipe-line transportation, had been acquired by a handful of holding

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21. As already pointed out, Willmut under appropriate authorizations distributes gas to domestic, commercial and industrial consumers in and around Hattiesburg, D'Lo, Mendenhall, Magee, Sanford, Mt. Olive and Collins, Mississippi. The form of municipal franchise under which it operates is substantially uniform, and provides that the consumers of natural gas in these cities and towns shall receive the benefit of any saving resulting to Willmut because of any decrease in the cost of natural gas purchased by Willmut.

The cities and towns in which United Gas Corporation owns the distribution system include Gulfport, Biloxi, Columbia and McComb, Mississippi, and Bogalusa, Louisiana, all of which are within United's Jackson rate area. The cities of Pensacola, Florida, and Picayune, Mississippi, own their distribution systems but purchase their requirements from United. Louisiana Power and Light Company owns the distribution system in Hammond, Louisiana, and purchases its gas supply from United.

companies. State commissions, independent producers, and communities having or seeking the service were growing quite helpless against these combinations. These were the types of problems with which those participating in the hearings were preoccupied. Congress addressed itself to those specific evils.

That the conclusion reached and referred to in the preceding paragraph is justified is borne out not only by what has been said; but also by representations made by the president of Willmut in correspondence addressed to the Commission, which representations are to be considered in the light of (1) the testimony of the Mayor of Hattiesburg that Willmut "has made a desperate fight and struggle to stay in the \* \* \* natural gas distribution business" and "is about the only independent gas distributor left in Mississippi, and certainly in south Mississippi"; (2) the testimony of Willmut's president that MPL and United were both subsidiaries of Electric Bond and Share Company, and that "United was desirous of eliminating Willmut"; and (3) the fact that United Gas Corporation (United's present parent corporation) is engaged in the distribution of natural gas in areas adjacent to those served by Willmut.<sup>22</sup> In his letter dated August 17, 1948, the president of Willmut advised the Commission:

The attention of your commission is also called to the fact that this company has maintained low domestic rates, lower than the other distribution com-

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22. In a booklet published by United Gas Corporation and covering the history of the development of the natural gas industry in Mississippi, it is stated that "the United Gas companies" are "Union Producing Company, engaged in exploration and production; United Gas Pipe Line Company, engaged in transmission; and United Gas Corporation, engaged in the distribution of natural gas." "The total state and local taxes paid in Mississippi from 1931 to 1949, inclusive, by United Gas Corporation and subsidiaries aggregate \$9,178,751.82."

panies and by so doing has caused the other distribution companies to have to lower their rates for domestic gas \* \* \*. This has resulted in a large saving to domestic consumers and if you will check our rates against the rates at Meridian, the towns in Northeast Mississippi such as Tupelo and Columbus, and the small towns recently taken on by United Corporation you will observe the vast difference in rates in domestic consumers. The Hattiesburg situation is the reason for lower domestic gas rates for towns served by United Corporation such as Laurel, Gulfport, Biloxi, and McComb.

And in a prior letter dated September 16, 1948, addressed to the Commission, Willmut's president stated:

The attention of your commission is called to Section 21 of our contract with United Gas Pipe Line Company. This section of the contract places a burden and so to speak a mortgage on the Willmut Gas and Oil Company's property in that it specifies we cannot sell or dispose of these properties unless we get the buyer to agree to continue purchase of gas under the contract. This places our distribution systems so they could not be sold to other parties and the only buyer available would be United Corporation \* \* \*.

\* \* \*

The attention of your commission is called to the fact that United is serving an affiliated company, namely, Mississippi Power and Light Company, at low city gate rates and refusing to serve Willmut \* \* \* at such reasonable rates by claiming to serve in such a manner that they are not subject to the Natural Gas Act and your commission.

Further consideration of the foregoing would be at the risk of obscuring the obvious by discussing it.

One additional point should be referred to, namely, the allegation contained in United's answer (filed January

10, 1949) to the complaint that its return is less than a just and reasonable return, and that its deficiency in earnings will increase in subsequent years (p. A5, *supra*). In this connection, the Commission in its Opinion No. 206, *In the Matter of United Gas Pipe Line Co.*, Docket No. G-1447, issued approximately two years later, or on February 27, 1951, pointed out that "United submitted a system-wide cost of service study including a 6% rate of return which shows an average cost of 13.16¢ per Mcf on the system" (p. 17 of mimeographed copy of opinion). This compares with the 17.5¢ rate charged MPL and the 25¢ rate charged Willmut and the other customers in the Jackson rate area, and is lower than any area rate fixed by the Commission in 1943 in *Louisiana Public Service Commission v. United Gas Pipe Line Co.*, *supra*, as hereinabove shown in excerpts from that opinion (pp. A27-A28, *supra*). The fact that United voluntarily granted MPL a domestic rate of 17.5¢ also suggests that United thought it was continuing to earn a reasonable return for "experience does not indicate that utilities are wont to charge themselves out of business" (*Federal Power Commission et al. v. Interstate Natural Gas Co.*, 336 U.S. 577, 582) unless, of course, there are "extraordinary circumstances making submission to the loss expedient" (*Dayton Power and Light Co. v. Public Utilities Commission*, 292 U.S. 290, 312).

## II.

The contention of counsel for United that if discrimination is found to exist the Commission is powerless to act until it has concluded a complete "rate case" is likewise lacking in merit. This contention has been effectively answered by the Commission in dealing with a like situation in *Otter Tail Power Co.*, *supra*. In that case the Commission said of provisions of the Federal Power Act which

are similar to Sections 4(b) and 5(a) of the Natural Gas Act<sup>23</sup> (2 FPC at p. 149):

\* \* \* [F]or many years the Interstate Commerce Commission had administratively interpreted provisions of the Interstate Commerce Act, similar to the rate provisions of the Act before us, as empowering that Commission to prescribe a rate found to be reasonable for the purpose of removing a discrimination without making a finding that it is just and reasonable *per se*. *Alexander Sprunt & Son v. United States*, 23 F.2d 874, 878, where a three judge court approved such interpretation as a fair construction of the words "just and reasonable" rates. A common sense construction of sections 205 and 206 of the Federal Power Act impels us to accept the principles announced in the foregoing cases as being equally applicable in solving the problem with which we are confronted in this case.

It occurs to us that one rate in its relation to another may be discriminatory, although each rate *per se*, if considered independently, might fall within the zone of reasonableness. There is considerable latitude within the zone of reasonableness insofar as the level of a particular rate is concerned. The relationship of rates within such a zone, however, may result in an undue advantage in favor of one rate and be discriminatory insofar as another rate is concerned. When such a situation exists, the discrimination found to exist must be removed.

For the purpose of removing a discrimination we interpret the statute to mean that the reasonable

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23. As stated in *Hope Natural Gas Co. v. Federal Power Commission*, *supra*, Section 4(b) "of the Act \* \* \* forbids natural gas company from maintaining 'any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.' The power of the Commission to eliminate any such unreasonable difference or discrimination, is plain 5(a)." (320 U.S. at p. 517).

wholesale rate for any class of customers be not higher than the lowest rate charged by vendor utility to any customer of the same class of service under the same or substantially similar conditions. If a complete "rate case" is to be conducted before the patent discrimination existing in the instant case is to be removed, such would obviously place a strained construction on the Act and render it ineffective for the expeditious removal of unjust discriminations.

As is made clear in the foregoing ruling in the *Otter Tail Power Company* case, there is abundant reason for rejecting the contention that a complete rate case must be conducted before "patent discrimination" can be removed by order of the Commission. Acceptance of this contention would mean, insofar as this case is concerned, that the Commission must undertake and complete a cost study of one of the largest, if not the largest, natural gas companies in the United States; whose operations cover five states, before it could order the elimination of existing discrimination between two retail distributors in Mississippi. Such a cost study is what the Commission initiated by its order dated October 12, 1948, in Docket No. G-1142 (p. A7, *supra*) and is currently under way, and is, of course, a tremendous undertaking and can be made even more burdensome and time-consuming by reason of (1) litigation such as United has instituted (see *United Gas Pipe Line Co. v. Federal Power Commission*, 181 F. 2d 796, cert. den. 340 U.S. 827; also Civil Action 4680-50 now pending in the District Court of the United States for the District of Columbia), and (2) the refusal of an affiliate of United (Union Producing Company) to make readily available upon request pertinent cost and other data required by members of the Commission's staff in connection with their field investigation of the cost of rendering service. (see orders of the Commission entered August 22,

1952, and October 9, 1952, *In the Matter of United Gas Pipe Line Co.*, Docket Nos. G-1142 and G-2019). Surely it was not the intent of Congress to permit the Commission's hands to be tied in any such manner before it could afford relief to a comparatively small retail distributor such as Willmut.

In conclusion it is not inappropriate to say that it would be difficult to conceive of a case in which the Commission could more appropriately exercise its regulatory authority than in the case at bar. For to allow United to trifle with the Commission's jurisdiction in the manner attempted is to (1) permit it to circumvent the statutory scheme of regulation with the result that "the basic purpose of the Natural Gas Act fails of realization" (*Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, *supra*, 173 F. 2d at p. 789), and (2) ignore the rights of ultimate consumers whom the Act was designed to protect (*Federal Power Commission v. Interstate Gas Co.*, 336 U.S. 577, 581). No natural-gas company may be permitted, by conduct such as is reflected in the record in this case, or by any other means, to nullify the "primary aim" of the statute "to protect consumers against exploitation at the hands of natural gas companies" (*Federal Power Commission v. Hope Natural Gas Co.*, *supra*, 320 U.S. at p. 610).

### Findings and Conclusions

Upon consideration of all the evidence adduced and the briefs and arguments of counsel, as well as upon the preceding portion of this decision, it is further found and concluded that:

- (1) On December 3, 1948, Willmut and Hattiesburg filed a formal complaint against United which was designated by the Commission as Docket No. G-1158. The complaint (a) alleged that the price

at which United sells gas to Willmut is in and of itself unjust and unreasonable and, in addition, unduly discriminatory and preferential and (b) sought such appropriate relief as the Commission is authorized to grant under the provisions of the Natural Gas Act. A copy of the complaint was served on United on December 15, 1948, and its answer thereto, praying that the complaint be dismissed, was filed on January 10, 1949.

(2) The Commission, acting upon the suggestion of Willmut and Hattiesburg, in which United concurred, consolidated the complaint proceeding in Docket No. G-1158 with a general rate investigation of United instituted on the Commission's own motion in Docket No. G-1142. Thereafter the Commission consolidated the matters involved in Docket Nos. G-1142 and G-1158 with a show cause proceeding against United in Docket No. G-1508.

(3) By order dated April 15, 1952 the Commission on its own motion, and because "of the long pendency of these matters and the impracticability of setting these consolidated matters down for hearing now", severed the complaint proceeding initiated by Willmut and Hattiesburg in Docket No. G-1158 from the proceedings in Docket Nos. G-1142 and G-1508. Severance of the complaint proceeding from the general rate investigation of United, together with the absence of a cost of service study from the record in this proceeding, narrows the complaint to a "discrimination case" as distinguished from a "rate case."

(4) United is admittedly a "natural-gas company" within the meaning of the Natural Gas Act and is subject thereunder to regulation by the Commission.

- (5) Willmut is a retail distributor of natural gas wholly within the State of Mississippi. Since 1940 it has been almost entirely dependent upon United for its natural gas supply.
- (6) Hattiesburg is an incorporated municipality in the State of Mississippi and is the principal city served by Willmut.
- (7) United sells natural gas to Willmut for distribution and resale (a) in several cities and towns, including Hattiesburg, Sanford, Seminary, Collins, Mt. Olive, Magee, D'Lo, Mendenhall and East Jackson, Mississippi, and (b) to various rural customers.
- (8) United delivers natural gas to Willmut for resale in East Jackson, Mississippi, by means of a pipe line referred to in this proceeding as the "Sterlington-Jackson line" which extends from United's compressor station near Jackson, Mississippi, to Sterlington, Louisiana, where it connects with other interstate transmission lines owned and operated by United. Natural gas transported by the Sterlington-Jackson line is normally supplied from fields located in Louisiana and Texas.
- (9) Except for East Jackson, Mississippi, served by the Sterlington-Jackson line referred to in (8) above, United delivers natural gas to Willmut for resale to all the other cities and towns named in (7) above, and to various rural consumers, by means of a pipe line referred to in this proceeding as the "Jackson-Hattiesburg line" which extends from a point adjacent to United's Jackson compressor station to a point near Hattiesburg, Mississippi.
- (10) United's sale of natural gas to Willmut, referred to in (7), (8) and (9) above, is a sale for resale in interstate commerce subject to regulation under the provisions of the Natural Gas Act. Such

sale was made without contract from 1940 until August 20, 1943, when a contract between the parties became effective as United's Rate Schedule FPC No. 73, and Willmut continues to be served thereunder.

- (11) Upon application the Commission issued certificates of public convenience and necessity for the Sterlington-Jackson and Jackson-Hattiesburg lines referred to in (8) and (9) above, such certificates being for both the "transportation" and "sale" of natural gas in interstate commerce.
- (12) In 1946 natural gas was discovered in the Gwinville field in Mississippi at a point approximately midway between Jackson and Hattiesburg. By means of a transmission line certificated by the Commission, the Gwinville field was tied into the Jackson-Hattiesburg line, referred to in (11) above, on January 8, 1947, having previously been tied into United's paralleling "Jackson-Mobile line" on December 27, 1946. The Jackson-Mobile line extends from United's Jackson, Mississippi, compressor station to Mobile, Alabama, where it connects with other interstate transmission lines owned and operated by United, one of which extends eastward to Pensacola, Florida.
- (13) The Jackson-Mobile line referred to in (12) above is interconnected at points in Mississippi with the Sterlington-Jackson and Jackson-Hattiesburg lines referred to in (8) and (9) above, and is also interconnected at a point in Mississippi with a line owned and operated by United and referred to in this proceeding as the "Bogalusa 10-inch line" which extends to a point in the vicinity of Bogalusa, Louisiana.
- (14) At the time the Gwinville field in Mississippi, referred to in (12) above, was tied into the Jackson-Hattiesburg and Jackson-Mobile lines, the Jack-

son-Hattiesburg line was interconnected with the three other interstate transmission lines referred to in (13) above: (a) the Jackson-Mobile parallel line at two points in addition to the Gwinville tap which remains closed for back-flow from the Jackson-Mobile line; (b) the Sterlington-Jackson line at two points; and (3) the 10-inch line extending to Bogalusa, Louisiana.

- (15) By means of the pipe line transmission network referred to in (12), (13) and (14) above, the natural gas resources of United, particularly in its Jackson rate area, were combined and coordinately operated as an integrated and interconnected pipe line system serving Willmut, MPL (now Mississippi Valley Gas Company) and other customers in the Jackson district and elsewhere in United's service area.
- (16) The transmission pipe lines comprising the transmission network referred to in (15) above are subject to the jurisdiction of the Commission and are covered by certificates of public convenience issued by the Commission authorized their use for both the "transportation" and "sale" of natural gas in interstate commerce, such network being operated to transmit, coordinate and distribute interstate gas in such manner and in such volume as to insure continuity of service, maximum economic stability and adequate pressure throughout that division of United's interstate system.
- (17) Immediately following the date on which the Gwinville field was tied into the Jackson-Hattiesburg line on January 8, 1947, and in violation of the abandonment provision (Section 7(b)) of the Natural Gas Act, United caused installations and disconnections to be made for the purpose of rendering impossible any flow of interstate gas into the Jackson-Hattiesburg line from the Sterlington-Jackson and the 10-inch Bo-

galusa lines referred to in (13) and (14) above, and severed the north end connection (at the Jackson compressor station) between the Jackson-Hattiesburg line and the Jackson-Mobile line, that disconnection also being made without the Commission's consent and in violation of Section 7(b). Such installations and disconnections were made by United with the intent and purpose of placing United's sale to Willmut and other customers served by the Jackson-Hattiesburg line beyond the reach of Commission regulation under the Natural Gas Act.

- (18) The only interconnection presently existing between the Jackson-Hattiesburg line and United's transmission network in the Jackson rate area is the connection at the south end of the Jackson-Hattiesburg line (near Hattiesburg) with the Jackson-Mobile line.
- (19) While interstate gas flowed from the Jackson-Mobile line to the Jackson-Hattiesburg line on only seven occasions during the period from February 6, 1947 to April 22, 1952, at any time the pressure in the Jackson-Hattiesburg line drops below that of the Jackson-Mobile line, large volumes of interstate gas can and will automatically flow from the Jackson-Mobile line into the Jackson-Hattiesburg line.
- (20) The Jackson-Hattiesburg line continues to serve two essential functions in United's coordinated system operations: (a) it provides a means by which continuous and adequate natural gas service is automatically assured at all delivery points on that line, and (b) it transports gas originating in the Gwinville field to the Jackson-Mobile line for further transportation to points of need on United's integrated system.

- (21) United's sale to Willmut, insofar as made from the Jackson-Hattiesburg line, was not removed from the Commission's jurisdiction by the authorized installations and disconnection referred to in (17) above. Nor is the small amount of interstate gas which may flow from the Jackson-Mobile line into the Jackson-Hattiesburg line since February 6, 1947 a bar to Commission regulation of United's sale to Willmut to the extent made from the Jackson-Hattiesburg line.
- (22) United's operation on a rate area basis, rather than on an individual town border customer basis, and the Commission's exercise of its regulatory authority on that basis, entitle Willmut to the same rates, terms and conditions granted by United to MPL (now Mississippi Valley Gas Company), unless United discharges its burden of proof of making it affirmatively appear that substantial differences exist justifying the exclusion of MPL and its successor from the uniform rate applicable to all other town border customers in United's Jackson rate area. United made no such showing and the record is lacking in proof that substantial lawful circumstances exist justifying the existing difference in rates charged by United to Mississippi Valley Gas Company, as successor to MPL's gas distribution business, under United's FPC Rate Schedule FPC No. 95, as supplemented, and those charged Willmut under United's FPC Rate Schedule No. 73.
- (22) United sells and delivers natural gas to Willmut and to Mississippi Valley Gas Company under the same or substantially the same conditions of service.
- (23) Rates and charges demanded, charged and collected by United from Mississippi Valley Gas Company and its predecessor, MPL, were voluntarily established by United.

- (24) The lowest rate voluntarily made available by United to any town border customer within its established Jackson rate area is the rate available to each of its town border customers within that area.
- (25) Although Willmut is in the same class or classification as Mississippi Valley Gas Company and its predecessor, United (a) has failed without lawful justification to make natural gas available to Willmut at the same rates or charges voluntarily established and made available to Mississippi Valley Gas Company and its predecessor; (b) is unlawfully subjecting Willmut to undue prejudice and disadvantage; and (c) is unlawfully granting undue preference and advantage to Mississippi Valley Gas Company; and such practices by United are unjust, unreasonable, unduly discriminatory and preferential, and unlawful, in violation of the provisions of the Natural Gas Act.
- (26) The Commission has no authority under the Natural Gas Act to award reparations as requested by Willmut.
- (27) The Commission has no authority under the Natural Gas Act to make a finding as to the lawfulness of past rates charged by United to Willmut.

### Order.

WHEREFORE, IT IS ORDERED, subject to review by the Commission on appeal, or review by the Commission on its own motion, as provided in its Rules of Practice and Procedure, that:

- (A) United's motion to dismiss the complaint filed by Willmut and Hattiesburg be and the same is hereby denied.
- (B) Within 30 days after the date of issuance of this order, United shall file rate schedules available

- for all sales by United to Willmut, such rates and schedules to contain satisfactory rates and charges based on the rates and charges contained in United's Rate Schedule FPC No. 95, as supplemented, which became effective on July 26, 1947

/s/ Francis L. Hall,  
Presiding Examiner.

November 25, 1952.

**UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION**

Before Commissioners: Jerome K. Kuykendall, Chairman  
Dale E. Doty, Claude L. Draper, Nelson Lee Smith and  
Harrington Wimberly.

**OPINION No. 252**

In the Matter of Willmut Gas & Oil  
Company, *et al.*

v.

United Gas Pipe Line Company

} Docket No. G-115

Adopted: May 26, 1953

Issued: June 1, 1953

**Opinion and Order Modifying and Affirming As  
Modified Decision of Presiding Examiner**

**APPEARANCES**

*For Willmut Gas & Oil Company*

Garner W. Green, Sr., Esq.

Garner W. Green, Jr., Esq.

James Simrall, Jr., Esq.

*For City of Hattiesburg, Mississippi*

Honorable Edward J. Currie, Mayor

*For United Gas Pipe Line Company*

C. Huffman Lewis, Esq.

W. Scott Wilkinson, Esq.

Vernon W. Woods, Esq.

W. O. Crain, Esq.

E. J. Freiberg, Esq.

*For the Staff of the Federal Power Commission*

Louis L. Da Pra, Esq.

**Opinion**

This matter is before the Commission on appeal from the initial decision of the Presiding Examiner.

Subject to review by the Commission, the Examiner found that United Gas Pipe Line Company (United) by its failure to make natural gas available to Willmut Gas & Oil Company (Willmut) at the same rates or charges voluntarily established and made available to Mississippi Valley Gas Company (MVG) and its predecessor, Mississippi Power & Light Company (MPL), is subjecting Willmut to undue prejudice and disadvantage, and is granting undue preference and advantage to MVG, and that such practices by United are unjust, unreasonable, unduly discriminatory and preferential, and unlawful, in violation of the provisions of the Natural Gas Act (Act). Accordingly, he directed United to file rate schedules for all sales of natural gas by United to Willmut containing rates and charges based on the rates and charges contained in United's Rate Schedule FPC No. 95, as supplemented, which became effective on July 26, 1947 (6 FPC 982),<sup>1</sup>

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1. Official notice is taken that the rate schedule has been superseded by Rate Schedules DC-3J, G-3J, IND-1J and IND-2J set forth in United's FPC Gas Tariff, Original Volume No. 1, which rates schedules, among others, were permitted to become

and under which gas was sold to MPL and is now sold to MVG. Also, the Examiner denied United's motion to dismiss the complaint filed herein by Willmut and City of Hattiesburg, Mississippi (Hattiesburg).

The proceeding was initiated by the filing of the complaint by Willmut and Hattiesburg under Section 4(b) and 5(a) of the Act against United. Among other things, Willmut and Hattiesburg alleged therein that the contract rates at which United sells natural gas to Willmut are unjust and unreasonable and, in addition, unduly discriminatory and preferential. Complainants prayed, among other things, that the Commission fix just, reasonable, nondiscriminatory and nonpreferential rates for gas delivered by United to Willmut during the period January 1, 1940, "until final hearing", award reparations accordingly, and fix for the future a rate at which Willmut may purchase gas from United. In its answer, United moved that the complaint be dismissed on the grounds that, with the exception of deliveries made in East Jackson, Mississippi, "the natural gas delivered and sold to Willmut has been and is now wholly produced, transported and consumed within the State of Mississippi" and hence beyond the reach of the Act. In addition, United denied the alleged discrimination; asserted that its return is less than a just and reasonable return and that its deficiency in earnings will increase in subsequent years; and contended that the Commission is without authority under the Act to award reparations.

A public hearing upon the complaint and answer was held in May, 1952, and after the filing of briefs and oral

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effective as of August 3, 1952. The contract, which was Rate Schedule FPC No. 95, has been retained as a service agreement under the tariff, pursuant to the applicable provisions of the Commission's Regulations under the Act.

argument before the Examiner, the initial decision was served upon the parties. Exceptions thereto were filed by United, Willmut, and counsel for the Staff of the Commission. Thereafter, oral argument was heard by the Commission on the matters and issues raised by the exceptions.

Together with its numerous exceptions, United filed a motion requesting the Commission (1) to cancel and set aside the decision, (2) to remove the Examiner in this matter, appoint another Examiner to consider the record and determine the issues involved, or (3), in the alternative, to omit the intermediate decision procedure and decision and set this matter for argument to and decision by the Commission. Also United requested that, if the motion is not granted, the matters submitted in support thereof be treated as an exception to the decision.

#### **Motion to Cancel the Initial Decision**

We consider first United's motion to cancel the decision and for other relief. Patently, the Commission may not properly entertain a motion for the omission of the intermediate decision procedure at a time subsequent to the rendition of the initial decision. In the first place, the motion is not timely within the purview of Section 1.30 (c)(3) of the Commission's Rules of Practice and Procedure. Moreover, no useful purpose would be served by the waiver of the initial decision procedure under these circumstances. The motion to cancel and set aside the initial decision is subject to similar defects. Under Section 8(a) of the Administrative Procedure Act as implemented by Section 1.30(d)(3) of our Rules, the initial decision, in the absence of either an appeal to the Commission or review upon our motion within the time provided by the Rules, without further proceeding then be-

comes our final decision. Where, as here, exceptions to the initial decision have been timely filed, Section 8(a) of the Administrative Procedure Act makes it clear that we have all the powers we would have in making the initial decision. We retain complete freedom of decision as though we had heard the evidence ourselves. To that end, we may affirm, modify, or set aside the initial decision in whole or in part. Orderly procedure obviously requires that United, if it deems itself adversely affected by the initial decision, seek redress through exceptions filed pursuant to Section 1.31 of the Rules.

We find no warrant whatever in the record for United's request for the removal of the Examiner or for its charge that the decision is "infected with bias and prejudice." Preliminarily, we note that United does not allege that it has not had a full, fair, and impartial hearing. Nor does it allege that the Examiner displayed personal bias or prejudice, either against United or in favor of the opposite party, during the hearing by reason of which the Examiner is unable to exercise impartially his functions in the case. It may be presumed that, if such personal bias or prejudice had occurred, United would have filed a timely and sufficient affidavit pursuant to Section 7 of the Administrative Procedure Act for the Examiner's disqualification. It may correspondingly be presumed that United would not have requested, as it did, oral argument before the Examiner. The sequence of events suggests that this belated and unfounded charge stems merely from United's dissatisfaction with the result reached by the Examiner.

We are satisfied that all parties were afforded a full and fair hearing. We specifically find, upon careful consideration of the entire record, that the Examiner conducted the hearing in a strictly impartial manner and wholly

in accord with all the requirements of fundamental law as well as the Administrative Procedure Act. Likewise, an objective reading of the decision discloses that it is free of bias and prejudice. In view of the foregoing, the motion of United should be denied as hereinafter ordered.

### The Issues

We turn next to a consideration of the exceptions filed. In the main, they pose the same issues previously raised in the proceeding and which have been fairly and fully stated by Examiner. First, is United's sale of natural gas to Willmut "in interstate commerce" so as to be subject to regulation under the Act? Second, is United unduly discriminating against Willmut by charging MPL (now MV-G) a rate of 17.5¢ per Mcf for domestic gas while at the same time exacting a 25¢ rate for such gas from Willmut? Third, does the Commission have power to award reparations? Fourth, does the Commission have the power to make findings as to the lawfulness of past rates? These, we shall treat in the order stated.

The facts are largely without dispute. The Examiner has included in the decision a full and fair statement of the relevant facts involved. We shall allude from time to time to the facts to the extent necessary to pass upon the exceptions.

United is a "natural-gas company" within the meaning of the Act. It is engaged in the transportation and sale for resale of natural gas in interstate commerce. It transports by means of its integrated pipe-line system natural gas produced from fields in Texas, Louisiana, and Mississippi and delivers and sells it to industrials, other pipe-lines, and distribution companies, including Willmut, in the foregoing States and also in Alabama and Florida. It

is a holder of numerous certificates of public convenience and necessity granted by the Commission under the terms of Section 7 of the Act authorizing those activities subject to regulation by the Commission. One of the certificates, granted at Docket No. G-478 in 1943 (3 FPC 551), authorized United to acquire from Willmut and operate the Jackson-Hattiesburg line as an integral part of its natural-gas pipe-line system.

### **Jurisdiction**

The jurisdictional dispute here is whether United's sale to Willmut is now and has been since February 6, 1947, regulable by the Commission. The Examiner found that the sale is not removed from our jurisdiction by the circumstances under which it is now made. Firstly, the Examiner found that United made certain system operational changes without the permission of the Commission required by Section 7(b), and, therefore, has failed to remove itself from regulation under the Act. Secondly, he held that the relatively small amount of interstate gas involved since that date is no bar to Commission regulation. Thirdly, he pointed out that the present plan of operation for the Jackson-Hattiesburg line shows that it is not to be regarded as an isolated segment, separate and distinct from United's transmission network, but rather as an integral part of such network. For all these reasons, he concluded the Commission is empowered to regulate the rate for the Willmut sale.

United concedes that, until February 6, 1947, the sale made to Willmut from the Jackson-Hattiesburg line was regulable by the Commission. It challenges the jurisdiction of the Commission since that date. Its challenge is predicated upon an assertion that the gas transported through the Jackson-Hattiesburg line is produced, transported,

and sold within the State of Mississippi, and the contention that the system operational changes made by United do not constitute an abandonment of service or facilities within the meaning of Section 7(b). We do not agree. We find no support for the contention, either in the plain words of the statute or in its legislative history.

Prior to February 6, 1947, United delivered and sold to Willmut natural gas produced primarily from fields in Texas and Louisiana and brought into Mississippi and to Willmut by means of United's certificated Sterlington-Jackson 18-inch, Jackson-Mobile 16-inch, Bogalusa 10-inch, and the Jackson-Hattiesburg 8-inch pipe lines. In 1947, United commenced to take gas from the Gwinville Field, which is located in Mississippi midway between Jackson and Hattiesburg, over a certificated 12-inch pipe extending easterly from the field to the Jackson-Hattiesburg and Jackson-Mobile lines, which run parallel to each other. The Gwinville tie-line was certificated in 1946 at Docket No. G-724 (5 FPC 628).

The following are the system operational changes made by United for the avowed purpose of restricting the passage to Willmut through the Hattiesburg-Jackson line of intrastate gas only, for which changes it neither sought nor obtained Commission approval: It caused check valves to be installed and so locked as to obstruct the flow of interstate gas from the Jackson-Mobile line to the Jackson-Hattiesburg line by the means of the then newly-constructed Gwinville tie-line. It inserted a solid steel blind plate in the orifice flange of the meter station at the connection of the Bogalusa and Jackson-Hattiesburg lines, preventing thereby the passage to Willmut of gas from southeastern Louisiana. It severed and removed the connection between the Jackson-Hattiesburg line and Jackson compressor station, preventing the flow to Willmut of gas pur-

chased in Texas and Louisiana and transported to it by means of the Sterlington-Jackson and Jackson-Mobile lines. It further severed and removed the connection between the Jackson-Hattiesburg and the Sterlington-Jackson lines at a point a few miles west of the Jackson compressor station, which was used when Willmut first commenced to take interstate gas from United in 1940. When United acquired the Jackson-Hattiesburg line in 1943 and installed the connecting link with the Jackson-Mobile line near the compressor station, the connection was used for emergency purposes until its severance. As a result of the foregoing installations, severances, and removals, all accomplished without the permission of the Commission first had and obtained, United effected a discontinuance of the flow of interstate gas from the Jackson-Mobile line into the Jackson-Hattiesburg line except through the connecting link at or near the southern terminus of the latter line. Only a relatively small amount of interstate gas has flowed into such line through the link since February 6, 1947.

We hold that by its removal of segments of pipe lines operated under certificates of public convenience and necessity United has physically abandoned facilities within the meaning of the plain words of Section 7(b). The section prohibits a natural-gas company from abandoning "all or any portion of its facilities subject to the jurisdiction of the Commission." Unquestionably the segments of pipe lines are "facilities" within the meaning of the section. There can be no doubt that these segments, at the time of their severance and removal, were "subject to the jurisdiction of the Commission" within the meaning of the section. These conclusions are fortified by the legislative history of Section 7(b), particularly the failure of adoption of an industry amendment designed to give natural-gas companies "the right to make temporary abandonments, changes

in equipment, substitution of pipe lines, and short-distances and loops" without the consent of the Commission under Section 7(b) where no effect on service would result (House Hearings on H. R. 4008, 75th Cong., 1st Sess., p. 127). Failure of United to secure permission for the foregoing severances and removals in the face of the mandatory provisions of Section 7(b) precludes it from validly asserting that it has negated the Commission's jurisdiction over the Willmut sale.

We further hold that United's discontinuance of interstate natural-gas service rendered to Willmut by means of certificated facilities, including those which it removed or which it disabled from performing the operations for which certificates were issued, by the installation of check valves, a blind plate, and other contrivances, is an abandonment of service within the meaning of the plain words of Section 7(b). And this conclusion is not affected by the incidental fact that United has replaced that service by intrastate service in a manner satisfactory to it. For Section 7(b) also prohibits a natural-gas company from abandoning "any service rendered by means of" facilities subject to the Commission's jurisdiction.

But for the foregoing installations, severances, and removals, United today would undoubtedly be rendering interstate service to Willmut in accordance with the terms and provisions of its certificate at Docket No. G-478. Plainly, United has abandoned interstate service to Willmut almost completely. A reduction in interstate service by the installation of controls being an abandonment of service within the meaning of Section 7(b), as the United States Court of Appeals for the Sixth Circuit said in *Parhandle Eastern Pipe Line Company v. Michigan Consolidated Gas Company*, 177 F. 2d 942, 945, *a fortiori*, an almost complete cessation of interstate service is an abandonment.

This principle is equally true whether the abandonment is affected by a severance of facilities or by manipulation of valves.

The legislative history of Section 7(b) includes a recognition that one of the purposes of the section was to forbid a company, once embarked upon interstate operation, to change its mind and become an intrastate operator except after proceedings contemplated by the section (House Hearings on H. R. 5423, 74th Cong., 1st Sess. pp. 437, 438).

Whatever freedom United may have had prior to the passage of the Act to switch from interstate to intrastate service vanished when it became subject to regulation by this Commission and when it applied for and received certificates of public convenience and necessity under which it transported and sold gas in interstate commerce and used therefor facilities subject to the jurisdiction of the Commission.

An examination of the duties voluntarily undertaken by United when it initiated operations authorized by certificates of public convenience and necessity further fortifies this conclusion. Whatever its duties may have been prior to operations under the G-478 certificate, it is amply clear that, once United acquired the Jackson-Hattiesburg line from Willmut and commenced operating it as an integral part of its transmission network, there was impressed upon United the duty to use those facilities for the transportation and sale of natural gas in interstate commerce in the manner specified in the certificate. This is of course a continuing responsibility until proper authorization for abandonment is obtained. And it is a corollary of United's acceptance and enjoyment of the privileges granted by the Commission under the Act.

Effective administration of the provisions of the Act requires that the Commission insist on proper discharge of those duties. If departure therefrom becomes necessary, United may so show as required by Section 7(b). Otherwise, the fundamental purpose of the Act to protect ultimate consumers served by certificated facilities is frustrated.

Under the provisions of Section 7(b) a natural-gas company may apply to the Commission for permission to abandon facilities or service subject to its jurisdiction. After due hearing, the Commission may grant such permission but only if it finds that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience and necessity permit such abandonment. Here, instead of following the prescribed procedure, United wrongfully arrogated unto itself the basic decision. (Cf. *Pennsylvania Water & Power Co. v. Federal Power Commission*, 343 U.S. 423-24). As was said by the Kansas Supreme Court in *State v. Missouri, K. & T. R. Co.*, 232 P. 1038, 1039 (1925) "in no event may public utilities arrogate the right to determine for themselves the functions and powers conferred upon the Commission." Nor does the failure of United to secure permission for the abandonment of interstate, even though it substituted intrastate, natural-gas service nullify the Commission's jurisdiction over the Willmut sale.

United seeks support for its position from language in *The Matter of The Connecticut Light and Power Company*, Docket No. IT-5665, 6 FPC 104 (1947). But there, prior to the effective date of the Federal Power Act, the company, for the avowed purpose of avoiding anticipated federal regulation, severed interstate connections and discontinued its one interstate sale for resale. Here, United

after the effective date of the Natural Gas Act, submitted itself to regulation thereunder.

Secondly, the Federal Power Act does not contain the certificate provisions found in the Natural Gas Act. More specifically, it contains no section similar to Section 7(b).

United concedes that it made the system operational changes without filing a "formal petition" for abandonment. But it argues that it "formally" advised the Commission of these changes by its letter of September 10, 1946, filed at Docket No. G-708. United seems to think the letter sanctioned the system rearrangements. The claim is palpably invalid

It is predicated upon the following circumstances: Early in 1946 United filed an application for a certificate at Docket No. G-708 authorizing the extension of the Jackson-Hattiesburg line from the Jackson compressor station to Philadelphia, Mississippi. Subsequently, United filed a motion to withdraw the application for the reason it had concluded that the communities along the Philadelphia extension would be served with Mississippi gas. It said in its motion that before commencing construction it would advise the Commission how the aforesaid service would be provided. After the application had been permitted to be withdrawn, United transmitted to the Commission the letter of September 10.

It is to be observed that nowhere in the letter did United state that it proposed to sever the G-478 facilities. Nor did it mention a proposal to seal off the flow of interstate gas from the Bogalusa line. No mention was made that it proposed to sever the Sterlington-Jackson line from the Jackson-Hattiesburg line at a point a few miles west of the compressor station. The letter stated that the Philadelphia extension would be connected to the Jackson-

Hattiesburg line at the Jackson compressor station. The changes referred to were characterized by United as "minor construction changes." In conclusion, United said that after such construction it will be physically impossible for any interstate natural gas to move through the proposed 6-inch line extending to Philadelphia." No suggestion was made that Willmut would not be served with interstate gas. In fact, no mention is made at all of service to Willmut.

In any event, it is clear that United did not in that letter seek Commission approval for the acts described therein. Nor might it or was it construed to be an application under Section 7(b) for permission to abandon. Furthermore, there is a fatal absence of the hearing and findings mandatory under that section. As we said in 1942 *In the Matter of United Gas Pipe Line Company*, Docket No. G-216, 3 FPC 3, at page 9:

\* \* \* nor would United be justified in assuming that, in the face of the mandatory provisions of section 7(b) of the Act, either (a) the facilities, or (b) the service rendered by means of such facilities could be abandoned in the absence of the approval of the Commission, after a hearing or hearings, and the production of requisite evidence justifying the finding or findings prescribed by said section. *Seaboard Air Line Railway Receivers' Proposed Abandonment*, 202 I. C. C. 543, 553.

The case of *In the Matter of United Gas Pipe Line Company*, Docket No. G-556, 7 FPC 646 (1948) cited by United is not in point. There, we merely dismissed United's application for a certificate upon motion by United. In contrast to the situation here, United had not there embarked upon the transportation and sale of natural gas in interstate commerce pursuant to a certificate issued after due notice and hearing.

Turning to another point, United misreads into the Examiner's decision a purpose to extend the jurisdiction of the Commission to the production and gathering of natural gas contrary to Section 1(b). No such inference can be reasonably drawn from the decision. The Examiner deals with facilities used in the transportation of natural gas in interstate commerce and the sale of natural gas to Willmut in interstate commerce for resale for ultimate public consumption. Those activities are clearly within the ambit of the Commission's jurisdiction expressly granted by the Act. And that grant is of course not nullified by United's wrongful acts.

United excepts to the finding of the Examiner that the small amount of natural gas which has flowed into the Jackson-Hattiesburg line from the Jackson-Mobile line since February 6, 1947, is no bar to federal regulation.

As we have seen, United conceded that the sale to Willmut was one "in interstate commerce" for resale and subject to regulation prior to that date. The circumstance that only a relatively small amount of gas has moved in the line since then is a direct consequence of the system rearrangements made by United without the permission required by Section 7(b). The Commission's plenary jurisdiction over the Willmut sale is unaffected by those unauthorized system rearrangements. The quantity of interstate gas delivered under presently existing conditions is therefore immaterial. In any event, as *Pennsylvania Water & Power Co. v. Federal Power Commission*, 343 U.S. 414, cited by the Examiner, holds, federal rate authority applies to all electricity sold despite the fact that it is made up of interstate energy, together with that locally produced

We turn next to Staff counsel's exception to the Examiner's failure to require United to restore the facilities

so that full interstate service to Willmut may be resumed. The contention is made that there is ample authority within the framework of the Act for the Commission so to order. Counsel points to the Examiner's assertion that United's unauthorized rearrangement of its system operations may be corrected by order of the Commission directing the establishment of system operations existing prior to February 6, 1947. The Examiner stated that power to take such action is granted by the provisions of Section 16 of Act authorizing the Commission to perform any act and to issue any order which it may find necessary or appropriate to carry out the provisions of the Act. It is plain, however, that Section 16 does not grant the Commission any power to issue an order which does not have its genesis elsewhere in the Act (Cf. *Federal Power Commission v. Panhandle Eastern Pipe Line Company*, 337 U.S. 498, 508).

Turning to the Act we find that Sections 4(b) and 5 (a) grant the Commission power to regulate interstate service (*Michigan-Consolidated Gas Company v. Panhandle Eastern Pipe Line Company*, 173 F. 2d 784, 789). Section 7(e) grants the Commission power to issue certificates of public convenience and necessity to any qualified applicant therefor, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder; and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity. That section also grants the Commission power to attach terms and conditions to the issuance of the certificate and to the exercise of the rights granted thereunder. Section 7(b), as we have seen, prohibits the abandonment of in-

terstate facilities or service. And this prohibition plainly requires a continuation of service until abandonment is authorized. Finally Section 16, authorizes the Commission to do all acts reasonably necessary and fairly appropriate to make the grant of these powers, which Congress has expressly conferred upon the Commission, fully efficacious (*Colorado Interstate Gas Company v. Federal Power Commission*, 142 F. 2d 943, 952). Otherwise, these provisions, which are integral parts of the broad and comprehensive scheme provided by the Act for the regulation of the wholesale distribution to public service companies of gas moving in interstate commerce, would be deprived of significant meaning.

It must also be remembered that when the Commission granted United the G-478 certificate, it found that the acquisition and operation proposed was required by the public convenience and necessity. Also, the Commission found that United was "able and willing" properly to do the acts and perform the service proposed, and to conform to the provisions of the Act and the regulations of the Commission. By its initiation of service authorized by the certificate United undertook the duty of continuing to perform the service and of satisfying the demands of the public convenience and necessity. And until and unless a satisfactory showing is made pursuant to the provisions of Section 7(b) that the available supply of natural gas is depleted to the extent that the continuance of such service is unwarranted, or that the present or future public convenience and necessity permit United to lay aside that obligation so voluntarily assumed, that duty must continue to be discharged.

Against the background of the particular grant of powers noted and the duties voluntarily assumed by United when it initiated service under the G-478 certificate, Section

tion 16, as a necessary corollary, authorizes the Commission to order restoration of the certificated facilities and the resumption of the certificated service which United abandoned without the approval of the Commission.

It may be noted that the evidence shows that the facilities may be restored in a matter of hours. Also, as one of the largest natural-gas companies, United would presumably have no financial difficulties in making such restoration.

In view of all of the foregoing, we shall require United to restore the certificated facilities and interstate service abandonment of which has never been authorized, as hereinafter ordered.

### **Discrimination**

After careful consideration of the entire record, we find no reason to depart from the Examiner's finding that, by its failure without lawful justification to make natural gas available to Willmut at the same rates or charges voluntarily established and made available to MVG and its predecessor, MPL, United is unlawfully subjecting Willmut to undue prejudice and disadvantage; and unlawfully granting undue preference and advantage to MVG; and that such practices by United are unjust, unreasonable, unduly discriminatory and preferential, and unlawful, in violation of the provisions of the Act. The evidence conclusively demonstrates that United is unduly discriminating against Willmut by charging MPL (now MVG) a rate of 17.5¢ per Mcf for domestic gas under its Rate Schedule FPC No. 95 while at the same time exacting a 25¢ rate for such gas from Willmut under its Rate Schedule FPC No. 73.<sup>2</sup>

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2. Official notice is also taken that in 1952 United filed a proposed notice of cancellation of that portion of this rate sched-

In passing, we note that the Examiner has not, as United contends, misrepresented the contentions of Willmut and Hattiesburg. Plainly, this part of the proceeding is a "discrimination case." Complainants plead undue discrimination. Alleged discrimination has been denied by United. And we are satisfied that undue discrimination has been shown to exist.

Numerous of United's rate schedules in the Jackson rate zone are of record. The Jackson rate zone embraces the territory from the Mississippi River east to Pensacola, Florida, but excluding the New Orleans area. It includes Jackson, Mississippi; Mobile, Alabama; and Pensacola, Florida. The city-gate rates prescribed in such schedules are applicable to the sale and delivery of natural gas for resale for domestic and commercial use only. With respect to the sale for resale of gas for industrial use, the evidence shows that United customarily entered into certain percentage arrangements with each distributor. We are concerned here with the discrimination shown in the rates for resale of gas for domestic purposes between Willmut and MVG. Such gas will be identified here as "domestic gas."

An unreasonable difference in rates for domestic gas under substantially similar conditions of service has been shown. Willmut and MVG are both located in United's Jackson rate zone, "a stone's throw" from each other. For many years, United extended a uniform rate for domestic gas to all customers in the zone. In 1947, it extended a lower rate to MPL for such gas. Discovery of gas in Mis-

ule relating to the sale of natural gas to Willmut except at East Jackson. The proposed notice was suspended, along with other matters, at Docket No. G-2019 by order of the Commission issued August 1, 1952.

Mississippi was given as the reason for the change, but in fact MPL and later MVG at all times here in question have been served with interstate gas. At the time of the change, United recognized that the rate voluntarily extended to MPL was lower than its other rates for "*similar service in the same territory*", a recognition adverted to by the Examiner. Both Willmut and MVG are in the same class, wholesale customers of United purchasing gas for resale. United classifies them as town-boarder customers. Admittedly, they are located in the same territory. The domestic-gas service rendered to them admittedly is similar. The cities and towns served by them are similar, except for differences of population. There is a substantial similarity of conditions under which Willmut and MVG receive natural gas. Thus, there is a close similarity between them with respect to the pressure at which gas is delivered, seasonal characteristics thereof, load factor, facilities utilized in serving them, type of metering facilities, and delivery points. Nor is there substantial variation in service conditions or in the characteristics of delivery and sale of domestic gas.

We are convinced that United has not established substantial differences in conditions of domestic-gas service to Willmut and MVG justifying it to require Willmutt to pay an approximately 50% higher price for such gas than is charged MVG. There is nothing in the record tending to indicate that cost per Mcf to United of transporting and delivering domestic gas to Willmut is more than the cost of transporting and delivering such gas to MVG. The differences shown by United do not affect our decision that undue discrimination exists with respect to domestic-gas service, such as the fact that MVG's consumption is predominantly industrial, Willmutt's predominately domestic; that MVG's over-all load factor is higher than Willmut's;

that the seasonal characteristics of industrial gas served is different from that of domestic-gas service; and that the average unit cost of all gas delivered to MVG is not identical to the average unit cost of all gas delivered to Willmut. The only material difference United has established is that it sells domestic gas to MVG at a lower rate than it sells such gas to Willmut.

An unreasonable difference in rates under substantially similar conditions of service constitutes unjust discrimination. *Western Union Telegraph Company v. Call Publishing Company*, 181 U.S. 92. United concedes that, under this definition, unjust discrimination exists if Willmut is required to pay a higher price for gas under like conditions of service. The premise upon which the right to the same price stands is, as the Supreme Court said, "like conditions of service." These conditions have been shown. And since "all individuals have equal rights both in respect to service and charges", which was also said in the *Western Union* case, the logical consequence is that Willmut is entitled to the same rate as MVG, as the Examiner properly found. For United to charge one customer approximately 50% more for gas delivered under substantially similar conditions is to require such customer to pay an unreasonable and unduly discriminatory rate.

It will be recalled that, in answer to the complaint, United alleged that its return is less than a just and reasonable return and that its deficiency in earnings will increase in subsequent years. The allegation was unsupported by evidence. United also asserted that its rates over which the Commission has jurisdiction will of necessity have to be substantially increased. At no time subsequent to July 26, 1947, the effective date of Rate Schedule FPC No. 95, however, has United sought an increase in such rate.

We take official notice of the fact that in 1952 it filed applications for increases in rates for sales to five natural-gas companies and one sale to United Gas Corporation, its parent, as well as in rates for certain transportation services. These rates are currently effective under bond pending decision at Docket Nos. G-2019 and G-2074. But it has not sought to exercise its privilege under the Act to file an increase in the 17.5¢ city-gate rate to MVG.

The Supreme Court has said that "experience does not indicate that utilities are wont to charge themselves out of business" (*Federal Power Commission v. Interstate Natural Gas Co.*, 336 U.S. 577, 582, unless there are "extraordinary circumstances making submission to the loss expedient" (*Dayton Power and Light Co. v. Public Utilities Commission*, 292 U.S. 290, 312), which cases are also cited by the Examiner.

Upon consideration of the foregoing, we are of the opinion that the 17.5¢ per Mcf rate to MVG must be deemed to be just and reasonable in the absence of evidence to the contrary. The Examiner's order that United file rate schedules for its sale to Willmut containing the rates and charges set forth in Rate Schedule FPC No. 95, is therefore determined to be proper and reasonable.

There is no basis for United's assertion that the Commission's action in permitting the 17.5¢ per Mcf rate to become effective removed the area served by MPL from the Jackson rate zone. No such intent was expressed in the order. Nor can any be implied therefrom, particularly in the light of United's representations made to the Commission as to the reasons for such change.

### Reparations

The Examiner correctly disposed of the contention of Willmut relating to reparations. The terms of the Act

and the authorities cited by him firmly establish the fact that we do not have the power to grant reparations.

### **Lawfulness of Past Rates**

No substantial reasons have been advanced for us to depart from the Examiner's finding as to lawfulness of past rates.

### **Other Matters**

We turn now to the other exceptions filed by United and Staff counsel.

The exception by United to references in the initial decision to orders of the Commission issued subsequent to hearing is not well taken. If an Examiner may take official notice of reports filed with the Commission subsequent to hearing, as was held in *Wisconsin v. Federal Power Commission*, 201 F. 2d 206, unquestionably he may take notice of orders of the Commission itself.

It seems to us that the Examiner did not err in concluding that United rearranged its system operations "in an effort to avoid Commission regulation of the Willmut rate." That conclusion may be reasonably inferred from the evidence adduced in light of the history of relations between United and Willmut. No pretense was made by United at the hearing that such rearrangement was done to improve operating conditions or was required by any operating exigencies. It was done admittedly "on advice of counsel." United contends now that such rearrangement was necessary to insure the passage of intrastate gas to the Philadelphia extension. That circumstance was an effect, not the cause, of the arrangement. If what is contended now were the cause of the arrangement, no justification for the obstruction of the flow of interstate gas to

Willmut through the Bogalusa line is apparent. In any event, whatever motivated United to cause the rearrangement, whether beneficial or not, cannot obviate the necessity for it to secure the requisite approval under Section 7(b). We think, however, that there is not an adequate basis for an inference that United, by the conduct reflected in this record, intended to 'squeeze Willmut out of the retail gas business. References thereto in the Examiner's decision should be deleted.

No prejudicial error is caused United by the Examiner's reference to letters written by Willmut to the Commission in 1948. Those portions appearing in the initial decision recite facts contained in other exhibits admitted in evidence in this proceeding.

The initial decision should be modified to show that Willmut commenced to take gas from United at a point on the Sterlington-Jackson line, a few miles west of the Jackson compressor station, rather than as inadvertently stated by the Examiner. The north end connection between the Jackson-Hattiesburg line and the Jackson-Mobile line referred to by him was at the compressor station, and it was made in 1943 subsequent to the issuance of the G-478 certificate.

The Commission, having considered the entire record with respect to the matters involved and the issues presented, including the complaint, the answer thereto, the evidence adduced at the public hearing, the briefs filed, the oral argument before the Examiner, his initial decision and exceptions thereto, and the oral argument before the Commission, further finds:

- (1) The initial decision and accompanying order filed by the Presiding Examiner on November 26, 1952, should be modified to conform to the views ex-

pressed herein and to correct the minor errors, and as so modified, should be affirmed as the Commission's final decision, as hereinafter ordered.

- (2) To the extent that the exceptions filed to such decision are inconsistent with any statement, finding, conclusion, or ordering paragraph contained herein, such exceptions should be denied as hereinafter ordered.
- (3) The motion filed by United on December 15, 1952, to cancel and set aside the initial decision and for other relief should be denied, as hereinafter ordered.

Pursuant to the provisions of the Natural Gas Act, particularly Sections 4(b), 5(a), 7(b), 7(e), 14 and 16, the Commission orders:

- (A) The initial decision of the Presiding Examiner filed on November 26, 1952, in this proceeding, as hereinafter modified, shall become effective as the decision of the Commission as of the date of issuance of this order.
- (B) The initial decision be and it is hereby modified in its narrative parts to conform with our views expressed herein and to correct the minor errors noted.
- (C) The following finding be and it is hereby added to the Examiner's decision:

"(28) It is just and reasonable and appropriate in carrying out the provisions of the Natural Gas Act, that United should be required to restore and re-establish the facilities and resume the interstate service as rendered to Willmut prior to February 6, 1947."

- (D) The following paragraph be and it is hereby added to the order accompanying the Examiner's decision, to be designated as paragraph (B) and

substituted for the paragraph so designated in the decision:

“(B) Within 30 days after the date of issuance of this order United shall:

- (1) Restore and re-establish the connections which existed prior to February 6, 1947, between (a) its Jackson-Hattiesburg line and its Jackson-Mobile line at the Jackson Compressor Station, and (b) its Jackson-Hattiesburg line and the Sterlington-Jackson line at a point approximately three miles west of the aforesaid compressor station.
- (2) Remove the steel (blind) plate from the orifice meter flange of the meter station located at or near the point where its 10-inch Bogalusa line connects with its Jackson-Hattiesburg line, and restore and re-establish the orifice plate which had been removed;
- (3) Make any other appropriate and necessary changes in the aforesaid facilities, which may be required to fully restore and re-establish the facilities to the arrangement existing prior to February 6, 1947;
- (4) Resume the full operation of the natural-gas transmission pipe-line facilities authorized, by and in accordance with the provisions of, the certificate of public convenience and necessity granted, by Opinion No. 101 and accompanying order entered August 19, 1943, *In the Matter of United Gas Pipe Line Company*, Docket No. G-478, 3 FPC 551, in conjunction with its other

natural-gas transmission pipe-line facilities, for the transportation and sale for resale of natural gas, subject to the jurisdiction of the Commission, all as more fully described in its application therein, and in the aforesaid Opinion No. 101, and accompanying order; and in accordance with the provisions of the rate schedules required to be filed pursuant to the provisions of paragraph (C) hereof;

- (5) Continue the operations of such facilities in accordance with the provisions of the Natural Gas Act, as well as applicable rules, regulations, and orders of the Commission thereunder; and
  - (6) Immediately upon completion of the acts described in subparagraphs (1), (2), and (3), above, and upon full resumption of the operation required by subparagraph (4), above, file with the Commission, in writing and under oath, an original and four conformed copies, notice of the date or dates of such completion and resumption."
- (E) Paragraph (B) appearing in the Examiner's decision be and it is hereby redesignated Paragraph (C).
- (F) To the extent that the exceptions filed by United, Willmut, and Staff counsel are inconsistent with the opinion and order of the Commission herein, such exceptions be and the same are hereby denied.
- (G) The motion filed by United on December 15, 1952 to cancel and set aside the initial decision and for other relief be and it is hereby denied.

(H) Nothing contained in this order is to be construed as a waiver of any penalties or sanctions which may be imposed pursuant to the provisions of the Natural Gas Act against United, its agents, or officers, or any of them, for any unauthorized action disclosed by the record herein.

By the Commission. Chairman Kuykendall not participating. Commissioner Draper dissenting.

Leon M. Fuquay,  
Secretary.

Adopted: May 26, 1953

Issued: June 1, 1953

In the Matter of  
Willmut Gas & Oil Company, et al.

v.

United Gas Pipe Line Company

} Docket No. G-1158

DRAPER, Commissioner, *dissenting*:

I regret that I cannot subscribe to the opinion of the majority in this case. That opinion is based on the premise that this Commission has jurisdiction to consider and adjudicate certain rate questions arising from transactions which have been shown to be intrastate in character.

The fact that these transactions were formerly interstate is not disputed. The fact that their conversion to an intrastate status by United is a *fait accompli* is not disputed. The fact that this conversion without authorization from this Commission is a violation of Section 7(b) of the Natural Gas Act is affirmatively asserted, yet nowhere is it suggested that Section 20 of the Act might apply to the situation.

The subject matter of proceedings of this nature must be either interstate or intrastate. How it came to be so cannot affect that basic fact. If there is no transportation in interstate commerce and no sale for resale in interstate commerce, there is no jurisdiction vested in this Commission. The apparent theory that violation of Section 7(b) by United converts non-jurisdictional matters to jurisdictional is one I cannot follow. If there is such violation, the Act prescribes the clear course to be taken, and that course, it seems to me, is not to ignore the existing state of facts by proceeding as though the violation had not occurred and we were still faced with a situation which the record shows to have ended in 1947.

Incidentally, counsel for United made the following statement at the oral argument:

"The Examiner declared United's rearrangement of its system operation evidenced 'an effort to avoid Commission regulation of the Willmut Rate.' The only evidence on this point in the record is United's unquestioned proof that these rearrangements were made in order to transport intrastate gas to United's newly constructed 'Philadelphia extension' and that *the Commission was fully advised of the changes.*" (Emphasis supplied).

If the Commission had been so advised without taking steps under Section 20, it would almost appear that we had for years condoned the acts which the majority now seeks to order undone.

Had United sought and received authorization to do the acts which have made these transactions intrastate, I doubt that anyone would maintain that the rate issues could legally be considered and decided by this Commission.

I believe that we should be realistic and recognize that if a violation has occurred appropriate action should be instituted under Section 20. Further, it is my belief that we cannot now deal with the merits of these complaints against the level of United's rates.

With regard to United's motion to set aside the Examiner's decision, to omit the intermediate decision procedure, etc., I agree that it should be dismissed on the grounds stated in the majority opinion.

Claude L. Draper,  
Commissioner.

Filed: May 29, 1953

Issued: June 1, 1953

#### **APPENDIX "B".**

THIS AGREEMENT made and entered into on this 20th day of August, 1943, by and between UNITED GAS PIPE LINE COMPANY, A Delaware corporation, hereinafter called "SELLER", and WILLMUT GAS & OIL COMPANY, a Delaware Corporation, hereinafter called "BUYER",

#### **WITNESSETH:**

WHEREAS, Buyer owns and/or operates gas distribution systems in the following cities, towns, villages and communities in the State of Mississippi, to-wit:

<u>Name</u>	<u>County in Which Situated</u>
Collins	Covington
D'Lo	Simpson
East Jackson	Rankin
Hattiesburg	Forrest
Magee	Simpson
Mendenhall	Simpson
Mount Olive	Covington
Sanatorium	Simpson
Sanford	Covington
Seminary	Covington
Whitfield	Rankin

and in their adjoining environs, and desires to purchase from Seller gas for resale and distribution through said distribution systems as now constructed and as may be hereafter enlarged and extended, and for such other purposes as are hereinafter specified; and

WHEREAS, Seller has a supply of gas available for delivery to Buyer and is willing to sell and deliver to Buyer such gas for resale and distribution, as hereinafter provided.

NOW THEREFORE, in consideration of the covenants and agreements hereinafter set forth, to be kept and performed by the parties hereto, it is agreed by and between said parties as follows:

# I.

Subject to the terms and conditions hereof, Seller agrees to sell and deliver or cause to be delivered to Buyer, and Buyer agrees to purchase and receive from Seller and pay Seller for (a) all gas necessary to meet Buyer's requirements of gas for resale and distribution through its said distribution systems and through the facilities de-

scribed in Section XVI hereof and any extensions thereof, (b) all gas consumed by Buyer in connection with the operation of said distribution systems and facilities, and (c) all gas lost and unaccounted for after delivery to Buyer hereunder.

It is understood that Buyer presently has a supply of gas from the Jackson Field sufficient for a portion of its requirements, and Buyer expressly reserves the right to continue using such gas as long as the same is available.

## II.

The city gate delivery points for gas to be sold and delivered by Seller to Buyer under the agreement shall be at the points where the several termini of Seller's pipe line facilities (purchased by Seller from Buyer by deed of even date herewith, to which deed reference is hereby made for a description thereof) connect to Buyer's facilities serving the cities, towns, villages and communities hereinabove named, at which termini Seller may, as hereinafter provided, establish metering stations; and at such other delivery points as may be mutually agreed upon by Seller and Buyer from time to time.

## III.

The gas to be sold and delivered by Seller to Buyer hereunder shall be delivered at said points of delivery at such pressures (not to exceed sixty (60) pounds per square inch gauge pressure) as may be necessary to meet Buyer's requirements and as can be maintained without more than one stage of regulation by or on behalf of Seller; provided, however, that all gas delivered under the provisions of Section XVI hereof shall be delivered at such pressures as exist in Seller's lines at the points of delivery therein described; and Buyer agrees to receive and take gas hereun-

der at the pressures in this Section III specified and thereafter to regulate and control said gas for delivery to its consumers.

#### IV.

Except as provided in Section XVI hereof and as otherwise provided in this Section IV, Seller shall install and maintain in accurate repair at the points of delivery herein provided, meters of ample size and type for the accurate measurement of the gas delivered by Seller hereunder, with volume and pressure recording gauges, and shall cause said meters to be read regularly.

The respective meters, meter readings and meter charts shall be at all reasonable times accessible to inspection and examination by Buyer. At least once each thirty (30) days Seller shall calibrate its orifice meters, gravimeters and thermometers and at least once each (60) 60 days Seller shall calibrate its positive displacement meters. Buyer shall have the right to require the meters to be calibrated at any time, but calibrations made at Buyer's request shall be at the expense of Buyer unless the percentage of inaccuracy is found to be two per cent (2%) or more, in which case the calibration shall be made at the expense of Seller. Readings, calibrations and adjustments of Seller's meters and changing of charts shall be done only by Seller, but all data with respect thereto shall at all reasonable times be available to Buyer. If, upon any test, the percentage of inaccuracy shall be two per cent (2%) or more, registrations thereof shall be corrected at the rate of such inaccuracy for any period which is definitely known or agreed upon, but in case the period is not definitely known or agreed upon, then for a period extending back one-half of the time elapsed since the last date of calibration. Following any test, metering equipment

found inaccurate shall immediately be restored by Seller to a condition of accuracy. If for any reason any meter is out of service or out of repair, so that the amount of gas delivered cannot be ascertained or computed from the reading thereof, the amount of gas delivered during the period such meter was out of service or out of repair shall be estimated and agreed upon by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

- (a) By using the registrations of Buyer's check meter, if installed as hereinafter provided for and accurately registering.
- (b) By correcting the error, if the percentage of error is ascertainable by calibration, test, or mathematical calculation.
- (c) By estimating the quantity of the delivery upon the basis of deliveries during preceding periods under similar conditions when the meter was registering accurately.

Buyer, may, at its option and expense, install and operate check meters to check Seller's meters, but measurement of gas for the purpose of this agreement shall be by Seller's meters only, except in cases herein specifically provided to the contrary. Check meters shall be either the orifice or displacement type and shall be subject at all reasonable times to inspection or examination by Seller, but the reading, calibration and adjustment thereof and changing of charts shall be done only by Buyer.

It is recognized and understood that Buyer has installed and is presently operating meters located at or near the delivery points hereinabove provided for, or in the vicinity of the cities, towns, villages and communities hereinabove named, through which the gas delivered to Buyer

hereunder for resale and distribution in said cities, towns, villages and communities can be measured. It is further recognized that in view of the shortage of critical materials used in the measurement of gas due to the present emergency, it may be impossible or impracticable for Seller to install meters at all or any of the delivery points hereinabove provided for; and, it is therefore agreed, notwithstanding any provisions herein to the contrary, that Seller shall not be required to install meters, as provided in this article at the delivery points hereinabove specified, but that Seller at its election, shall always have the right to install meters and meter stations, as hereinabove provided in this article at any or all of such delivery points for the measurement of gas delivered hereunder.

In the event Seller does not elect to install meters at all or any of the delivery points hereinabove provided for the measurement of all gas delivered to Buyer hereunder for resale and distribution in said Cities, towns, villages and communities at the delivery point or points where Seller has not installed meters shall be by Buyer's meters located at or near such delivery point or points; provided however, that if Seller elects to install a meter or meters at any or all of said delivery points, the measurement of the gas delivered hereunder at such delivery point or points where Seller has elected to install meters shall be by Seller's meters only, and said meters of Seller shall be governed by all of the terms and provisions hereinabove contained in this section relating thereto.

All meters owned by Buyer, through which gas delivered hereunder shall be measured by Seller as hereinabove provided, shall nevertheless remain the property of Buyer and be operated and maintained by Buyer but the reading, calibration and adjustment thereof and the changing of charts shall be done by Seller, under and in accord

ance with and subject to all of the terms and provisions herein contained with reference to the reading, calibration and adjustment of Seller's meters; if upon any test Buyer's said meters are found to be in need of repair, such repairs shall be made at Buyer's expense; and said meter readings and meter charts and all data with respect to the readings, calibrations and adjustments of Buyer's said meters shall at all reasonable times be available to Buyer for inspection and examination.

## V.

A "cubic foot of gas", for the purpose of measurement of the gas delivered hereunder and for all other purposes of this agreement, is the amount of gas necessary to fill a cubic foot of space when the gas is at a base pressure of eight (8) ounces gauge pressure above fourteen and seven-tenths (14.7) pounds per square inch atmospheric pressure and at a base temperature of sixty (60) degrees Fahrenheit, and the gas volumes shall be computed into such units in the manner described below. Recognizing that the atmospheric pressure may vary somewhat from time to time and that the average atmospheric pressure is approximately fourteen and seven-tenths (14.7) pounds per square inch, it is agreed that, for the purposes of measurement and computation, the atmospheric pressure shall be assumed to be fourteen and seven-tenths (14.7) pounds per square inch, regardless of the actual atmospheric pressure at which the gas is delivered and measured. It is likewise agreed that the gas shall be assumed to obey Boyle's law and no correction shall be made for any variation from this law.

When orifice meters are used for the measurement of the gas hereunder, the computation of the volumes of gas measured shall be made in accordance with the following paragraphs (1) to (7) inclusive:

(1) The hourly orifice coefficient for each meter shall be calculated at the above base pressure and base temperature, at a flowing temperature of sixty (60) degrees Fahrenheit and for a gas of sixty-hundredths (.60) specific gravity.

(2) Recognizing that the average flowing temperature at the orifice plate affects the calculation of the volume of gas measured and that such temperature may vary from time to time, it is agreed (a) that the temperature of the gas shall be determined by means of a recording thermometer of standard manufacture acceptable to both parties and so installed that it may properly record the temperature of the gas flowing through the meter or meters, and (b) that the average of the twenty-four (24) hour record from the recording thermometer shall be deemed to be the gas temperature for that day, and the orifice coefficient as calculated in (1) above shall be corrected daily for each degree variation in the average temperature from sixty (60) degrees Fahrenheit.

(3) And further recognizing that the specific gravity of the gas affects the calculation of the volume of gas measured and that such gravity may vary from time to time, it is agreed that the specific gravity of the gas shall be determined by a recording gravitometer of standard manufacture acceptable to both parties and so installed by Seller that the specific gravity of the gas will be properly determined; or, if the parties hereto do not consider it necessary to install recording gravitometers at any points where tests are to be made, spot tests shall be made with an Edwards type gas balance, or by such other method as shall be agreed upon between the parties.

If the recording gravitometer is used, the average of the twenty-four (24) hour record from the recording in-

strument shall be deemed to be the specific gravity of the gas for that day, and the orifice coefficient as calculated in (1) above shall be corrected daily for each one-thousandth (.001) variation from sixty-hundredths (.60). If the spot test method is used, the specific gravity of the gas delivered hereunder shall be determined once monthly on a day as near the twentieth (20th) of the month as is practicable, or as much oftener as is found necessary in practice. The result obtained from the test on or near the twentieth (20th) of the month shall be deemed to be the specific gravity of the gas during the succeeding billing month, and the orifice coefficient as calculated in (1) above shall be corrected for each one-thousandth (.001) variation from sixty-hundredths (.60). Any special test which is made shall be applicable from the day made until the next regular test or other special test is made.

(4) Exact measurement of inside diameters of pipe runs and orifices shall be obtained by means of a micrometer to the nearest one-thousandth (.001) inch, which measurements shall be used in computations of coefficients.

(5) Pressure taps for meter installations shall be taken from pipe runs, two and one-half (2 1/2) inside pipe diameters upstream and eight (8) inside pipe diameters downstream from the orifice.

(6) All orifice meter computations required in this Section V shall be made in accordance with formulae and tables contained in Metric Metal Works Bulletin E-2. In the computations of the hourly orifice coefficient, the calculations of "X" shall be carried to six decimals and "C" shall be determined to three decimal places by interpolation from tables on pages 76 and 77 of Metric Metal Works Bulletin E-2. The pressure base, flowing temperature and specific gravity factors used shall consist of four



significant figures, unless the first digit is "1", in which case five significant figures shall be used. .

(7) In determining the volume of gas delivered through the orifice during a daily period, either the observation method or the orifice chart integrater shall be used in reading the meter chart. The sum of the extensions obtained from the reading or integration of the meter charts shall be multiplied by the hourly orifice coefficient, corrected in accordance with paragraphs (2) and (3) above, to obtain the gas volume for that chart.

When positive meters are used for the measurement of the gas hereunder, the flowing temperature of the gas delivered shall be assumed to be sixty (60) degrees Fahrenheit, and no correction shall be made for any variation therefrom; provided, however, that Seller shall have the option of installing recording thermometers, and if Seller exercises such option and installs such thermometers correction shall be made for each degree variation in temperature from sixty degrees (60°) Fahrenheit in the average flowing temperature for each monthly period.

## VI.

This agreement shall be for a term beginning August 20, 1943, and ending July 25, 1962.

## VII.

During the period beginning with the effective date of this agreement and ending July 25, 1947, the price to be paid by Buyer to Seller for each one thousand (1,000) cubic feet of gas sold and delivered to Buyer hereunder shall be as follows:

A. For all gas delivered by Seller to Buyer for resale and distribution to Buyer's domestic consumers,

twenty-five cents (25¢) per thousand (1,000) cubic feet.

The amount of domestic gas delivered hereunder during any month (being the gas to which the above mentioned rate is applicable) shall be the total volume of gas billed for such month by Buyer to its residential consumers plus the total volume of gas billed for such month by Buyer to its commercial and other consumers whose individual rate from Buyer for such month is thirty-one and one-fourth cents (31-1/4) or more per thousand (1,000) cubic feet.

B. For all gas delivered by Seller to Buyer for resale to industrial consumers, eighty per cent (80%) of the proceeds received or receivable by Buyer therefor from each such industrial consumer without deduction for unpaid accounts, except in such instances where delivery is made by Buyer through separate facilities not a part of Buyer's general distribution systems, in which instances the price to be paid shall be ninety per cent (90%) of the proceeds received or receivable by Buyer therefor from each such industrial consumer, without deduction for unpaid accounts; provided, however that Seller shall receive not more than twenty-five cents (25¢) per thousand (1,000) cubic feet for all such gas and shall receive not less than sixteen cents (16¢) per thousand (1,000) cubic feet therefor except in such cases, if any, as Seller may consent in writing to a lesser amount.

All gas sold by Buyer to its consumers, except domestic gas as defined above, shall be classified as industrial gas to which the rates provided in this subdivision B shall apply.

C. For all other gas used by Buyer the prices to be paid by Buyer shall be as follows:

(a) For gas so used or delivered for residential or commercial purposes, the price shall be twenty-five cents (25¢) per thousand (1,000) cubic feet.

(b) For gas so used or delivered for and purposes other than the purposes set forth in subparagraph (a) of this subdivision C, the weighted average rate charged Buyer by Seller for industrial gas delivered hereunder during the month for which settlement is made.

D. For unaccounted for gas (computed as provided in Section VIII hereof), the prices to be paid by Buyer to Seller shall be as follows:

(a) For unaccounted for gas allocated to deliveries of domestic gas, as provided in Section VIII hereof, twenty-five cents (25¢) per thousand (1,000) cubic feet;

(b) For unaccounted for gas allocated to deliveries of industrial gas, as provided in Section VIII hereof, the weighted average rate charged Buyer by Seller for industrial gas delivered hereunder during the month for which settlement is made;

(c) For unaccounted for gas allocated (as provided in Section VIII hereof) to the gas used by Buyer for residential and commercial purposes, twenty-five cents (25¢) per thousand (1,000) cubic feet; and for unaccounted for gas allocated to gas used by Buyer for any other purposes, the weighted average rate charged Buyer by Seller for industrial gas delivered hereunder during the month for which settlement is made.

The price to be paid by Buyer to Seller for each one thousand (1,000) cubic feet of gas sold and delivered to Buyer hereunder during each succeeding five (5) year period of this agreement, after July 25, 1947, shall be determined by agreement between the parties not less than twelve (12) months prior to the beginning of each of such five (5) year periods and failing so to agree the determination of the price shall be submitted to arbitration as hereinafter in this Section VII provided.

In the event no price has been agreed upon within twelve (12) months prior to the beginning of any five (5) year period to which the price is to apply, such price shall be determined in the following manner: Either party hereto may notify the other party in writing of the name of an arbitrator selected by such party and the other party hereto shall thereupon select an arbitrator and notify, in writing, the party first giving notice of the name of a second arbitrator. If such other party shall fail within twenty (20) days after receiving notice from the first party giving notice to name a second arbitrator, then the party first giving notice may, on five (5) days written notice to the other party, apply to the person who is the Judge then senior in office of the District Court of the United States of America, having jurisdiction for the Southern District of Mississippi, or any Federal Court of similar jurisdiction in said district, for the appointment of such second arbitrator for or on behalf of the other party and in such case the arbitrator appointed by the person who is such Judge shall act as if named by the other party. The two arbitrators chosen as above provided for shall, within ten (10) days after the appointment of the second arbitrator, choose the third arbitrator, and in the event of their failure so to do within said ten (10) day period, either of the parties hereto may in like manner on five (5) days notice to the other party apply to the person who is such Judge for the appointment of a third arbitrator, and in such case the arbitrator appointed by the person who is such Judge shall act as third arbitrator. The board so constituted shall fix a reasonable time and place for a hearing at which time each of the parties hereto may submit such evidence as it may see fit. Such board shall determine, within thirty (30) days after the matter is submitted to it, the price to be paid for the gas delivered hereunder during the five (5) year period under consideration.

The action of a majority of the members of such board shall govern and their decision in writing shall be final and binding on the parties hereto. Each party shall pay the expenses of the arbitrator selected by or for it and all other costs of the arbitration shall be equally divided between the parties hereto.

### VIII.

For the purpose of billing and accounting for gas delivered hereunder the day shall begin at seven o'clock (7:00) A.M. and extend to seven o'clock (7:00) A.M. on the following calendar day, and the month (hereinafter called "billing month") shall begin at seven o'clock (7:00) A.M. on the twentieth (20th) day of the calendar month and extend to seven o'clock (7:00) A.M. on the twentieth (20th) day of the following calendar month.

On or before the fifth (5th) day of October, 1943 and on or before the fifth (5th) day of each month thereafter, throughout the term of this contract, Buyer shall render to Seller at its office at Jackson, Mississippi, statements of the volume of gas delivered by Seller to Buyer, and the volume of gas as billed, used and delivered by Buyer during the preceding billing month, as follows:

- (A) For each of the distribution systems of Buyer in the cities, towns, villages and communities named herein; and for the farm taps, rural service lines, rural projects and oil field projects of Buyer, referred to in Section XVI hereof where a measuring station is maintained at Seller's point of delivery:
  - (1) The volume of gas delivered by Seller to Buyer during the preceding billing month for farm taps, rural service lines, rural projects and oil field projects of Buyer, referred to in Section XVI hereof where the

gas delivered to such facilities is measured by Buyer's meters at Seller's points of delivery.

- (2) The volume of domestic gas (as classified and defined in Subdivision (A) of Section VII hereof) as billed by Buyer to its consumers.
- (3) The volume of industrial gas (as classified and defined in Subdivision (B) of Section VII hereof) and the amount as billed therefor by Buyer to each of its industrial consumers.
- (4) The volume of gas used by Buyer showing separately the volume thereof to be classified as domestic gas and the volume thereof to be classified as industrial gas (as these terms are defined in Subdivisions (A) and (B) of Section VII hereof).

(B) For all the farm taps, rural service lines, rural projects and oil field projects of Buyer referred to in Section XVI hereof where a measuring station is not maintained at Seller's point of delivery;

- (1) The volume of domestic gas (as classified and defined in Subdivision (A) of Section VII hereof) as billed by Buyer to its consumers.
- (2) The volume of industrial gas (as classified and defined in Subdivision (B) of Section VII hereof) and the amount as billed therefor by Buyer to each of its industrial consumers; and
- (3) The volume of gas used by Buyer showing separately the volume thereof to be classified as domestic and the volume thereof to

be classified as industrial as these terms are defined in Subdivisions (A) and (B) of Section VII hereof.

Seller and Buyer agree that for the purpose of rendering statements of amounts due for gas delivered hereunder to the farm taps, rural service lines, rural projects and oil field projects described in the first paragraph of this Subdivision (B) the volume of gas as billed, used and delivered as provided in paragraphs (1) to (3), inclusive, of this Subdivision (B), plus unaccounted for gas computed as hereinafter provided, shall be taken as the volume of gas delivered by Seller to Buyer during the preceding billing month for the farm taps, rural service lines, rural projects and oil field projects described in the first paragraph of this Subdivision (B).

Upon receipt by Seller of the foregoing statements from Buyer, Seller shall compute the amount of unaccounted for gas to be billed Buyer as follows:

- (A) For each of the distribution systems of Buyer in the cities, towns, villages and communities named herein; and for farm taps, rural service lines, rural projects and oil field projects of Buyer, referred to in Section XVI hereof, where a measuring station is maintained at Seller's point of delivery, the unaccounted for gas shall be the difference between;
  - (a) The volume of gas delivered by Seller to Buyer during the preceding billing month for such distribution systems and farm taps, rural service lines, rural projects and oil field projects described in the first paragraph of this Subdivision (A); and
  - (b) The volume of gas as billed by Buyer to its consumers and gas used by Buyer during the preceding billing month from such

distribution systems and the farm taps, rural service lines, rural projects and oil field projects described in the first paragraph of this Subdivision (A).

- (B) For the farm taps, rural service lines, rural projects and oil field projects of Buyer referred to in Section XVI hereof where a measuring station is not maintained at Seller's point of delivery; the unaccounted for gas shall be computed by applying a percentage to the total volume of gas as billed by Buyer to its consumers and gas used by Buyer during the preceding billing month from such farm taps, rural service lines, rural projects and oil field projects, which percentage shall be furnished by Buyer and shall be the average percentage of unaccounted for gas during the preceding twelve (12) months period sustained by Buyer in all of its distribution systems in the cities, towns, villages and communities named herein, and in the farm taps, rural service lines, rural projects and oil field projects of Buyer where a measuring station is maintained at Seller's point of delivery.
- (C) Unaccounted for gas (computed and determined as hereinabove provided) for each distribution system in the cities, towns, villages and communities named herein, and for the farm taps, rural service lines, rural projects and oil field projects referred to in Section XVI hereof, shall be allocated (as between (a) domestic gas as billed by Buyer to its consumers, (b) industrial gas as billed by Buyer to its consumers, and (c) gas used by Buyer, in the same proportion that the respective volume of each of said classifications of gas designated in (a), (b) and (c) next above bears to the total volume of gas as billed (to domestic and industrial consumers) by Buyer and used by Buyer, during the preceding billing month from such distribution system,

farm taps, rural service lines, rural projects and oil field projects, and the unaccounted for gas so allocated to the classifications of gas designated in (c) next above shall then be proportionately allocated between domestic gas and industrial gas.

On or before the fifteenth (15) day of October, 1943, and on or before the fifteenth (15th) day of each month thereafter throughout the term of this contract, Seller shall render to Buyer at its office at Hattiesburg, Mississippi, a statement showing:

- (1) The volume of gas (computed as herein provided) delivered during the preceding billing month to each of Buyer's distribution systems in the cities, towns, villages and communities named herein, and to the farm taps, rural service lines, rural projects, oil field projects and other tap line consumers referred to in Section XVI hereof. Such volume of gas shall be classified (as to domestic and industrial gas as such terms are defined in Subdivisions (A) and (B) of Section VII hereof) with respect to the total volume of gas (a) as billed by Buyer and (b) gas used by Buyer, and the volume of unaccounted for gas computed and allocated (as hereinabove provided) to each of said classifications now designated in (a) and (b) next above.
- (2) The amount of money due Seller therefor computed at the prices in effect under the terms of this agreement covering the period for which the billing is made.

On or before the twenty-fifth (25th) day of each calendar month Buyer shall make payment to Seller of the amounts due Seller, as shown by the statements furnished Buyer in accordance with the foregoing paragraph.

In the event Buyer shall fail to pay for a period of thirty (30) days after the date provided for payment as above set out, any amount due Seller hereunder when the same is due, then it is agreed that interest thereon shall accrue at the rate of six per cent (6%) per annum from date when such amount is due until the same is paid. If such failure to pay continues for sixty (60) days, Seller may suspend deliveries of gas hereunder, and the exercise of such right shall be in addition to any and all other remedies available to Seller.

#### IX.

Each party hereto agrees to notify the other party daily and as much oftener as may be necessary of expected changes in the rates of delivery or takings of gas hereunder or in the pressures or other operating conditions and the reasons for such expected changes as soon as such reasons come to the knowledge of either party to the end that the other party may be prepared to meet or to take advantage of such expected changes when, as and if they occur.

#### X.

Buyer may enter into certain contracts for the sale of gas which provide for correction of price on account of excess or deficiency in B.T.U. content of the gas delivered and, as to the gas delivered under all such contracts, Seller agrees to furnish Buyer periodically, when necessary, information showing the B.T.U. content of such gas so as to enable Buyer to fulfill the provisions of its said contracts with reference thereto and to take full advantage of the price adjustments provided for.

## XI.

The gas deliverable hereunder shall be natural gas as produced in its natural state from the wells, except that Seller may extract, or permit the extraction of, any of the constituents thereof, provided that such extraction does not render such gas unmerchantable for Buyer's uses. Gas deliverable hereunder shall be, for the purpose of this contract, deemed merchantable for Buyer's use if it (a) be reasonably free from water and other objectionable fluids, (b) be reasonably free from sand and other objectionable solids, (c) contains not more than forty (40) grains of sulphur or twenty (20) grains of hydrogen sulphide per one thousand cubic feet, and (d) has a heating value of not less than eight hundred and fifty (850) B.T.U. per cubic foot as herein defined. In the event Seller delivers gas hereunder which fails to meet the minimum B.T.U. requirement of any existing franchise of Buyer covering any distribution system of Buyer, and such failure continues for thirty (30) days after Buyer gives Seller notice in writing of such failure, Buyer may, at its election, by giving written notice of such election to Seller, terminate this agreement with respect to its gas requirements for, but only for, such distribution system.

## XII.

In the event of either party being rendered unable, wholly or in part, by force majeure to carry out its obligations under this agreement, other than the obligation to make payments of amounts due hereunder, it is agreed that on such party giving notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as possible after the occurrence of the cause relied on, then the obligations of the party giving such notice, so far as they are affected by such force majeure,

shall be suspended during the continuance of any inability so caused but for no longer period, and such cause shall so far as possible be remedied with all reasonable dispatch. The term "Force majeure", as employed herein, shall mean acts of God, strikes, lockouts or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraint of rulers and people, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, freezing of wells or lines of pipe, partial or entire failure of natural gas wells or any other causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension, which by the exercise of due diligence such party shall not have been able to avoid. It is understood and agreed that the settlement of strikes or lockouts shall be entirely within the discretion of the party having the difficulty, and that the above requirements that any force majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes or lockouts by acceding to the demands of opposing party when such course is inadvisable in the discretion of the party having the difficulty.

### XIII.

As between the parties hereto, Seller shall be in control and possession of the gas deliverable hereunder and responsible for any damage or injury caused thereby until the same shall have been delivered to Buyer at the delivery points herein provided for, after which delivery, Buyer shall be deemed to be in exclusive control and possession thereof and responsible for any injury or damage caused thereby.

## XIV.

If either party shall fail to perform any of the covenants or obligations imposed upon it under and by virtue of this contract (except where such failure shall be excused under any of the provisions of this contract); then in such event the other party may at its option terminate this contract by proceeding as follows: The party not in default shall cause a written notice to be served on the party in default, stating specifically the cause for terminating this contract and declaring it to be the intention of the party giving the notice to terminate the same; thereupon, the party in default shall have thirty (30) days after the service of the aforesaid notice in which to remedy or remove the cause or causes stated in the notice for terminating the contract, and if within said period of thirty (30) days the party in default does so remove or remedy said cause or causes and fully indemnify the party not in default for any and all consequences of such breach, then such notice shall be ineffective and this agreement shall continue in full force and effect. In case the party in default, within said period of thirty (30) days, does not so remedy and remove the cause or causes or does not indemnify the party giving the notice for any and all consequences of such breach, then this agreement shall become null and void from and after the expiration of said period. Any cancellation of this agreement pursuant to the provisions of this Section XIV shall be without prejudice to the rights of the party not in default to collect any amounts then due it and without waiver of any other remedy to which the party not in default may be entitled for violation of this contract.

## XV.

Buyer specifically recognizes the fact that Seller delivers gas to (a) gas utilities other than Buyer for resale

to domestic and industrial consumers, (b) steam electric power plants for use in generating electricity which is sold to domestic consumers, and (c) industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all of its customers, including Buyer, then it is mutually agreed that the gas requirements of gas utilities (including Buyer) selling gas to domestic consumers (but only to the extent of gas required for resale to such domestic consumers) shall first be supplied by Seller. If Seller is unable to supply gas for all the requirements of such gas utilities for resale to domestic consumers, then gas for such requirements shall be supplied ratably. In the event Seller is able to supply gas for all the requirements of such gas utilities for resale to domestic consumers, then there shall next be supplied the gas requirements of steam electric power plants using gas for the generation of electricity which is sold to domestic consumers, whether such power plants purchase their requirements from Seller or from gas utilities (including Buyer) purchasing their requirements from Seller; and, if Seller does not have sufficient gas to supply all of the requirements of said power plants, then said requirements shall be supplied ratably. After the above gas requirements have been supplied, the remaining gas supply, if any, shall be prorated by Seller among its other customers, including Buyer and other gas utilities to the extent of gas sold by them to their other customers. In the event of any shortage of gas as in this Section XV provided, Buyer agrees that it will discontinue service of gas to its industrial consumers during the period of any such shortage, to the extent which may be necessary consistent with the provisions hereof.

Seller may, without liability to Buyer, interrupt its service hereunder for the purpose of making necessary al-

terations and repairs to its pipe lines and compressor station equipment and machinery, but only for such time as may be reasonable or unavoidable; and Seller shall give to Buyer, except in case of an emergency, reasonable notice of its intention so to do and shall endeavor to arrange such interruptions so as to inconvenience Buyer and the other consumers of Seller as little as possible. Seller shall also give to Buyer reasonable notice before resuming service after the same has been interrupted and agrees that it will not resume service hereunder until after having given Buyer reasonable time after notice within which to have a representative present when gas is again turned into Buyer's lines.

#### XVI.

Buyer may sell gas to various rural consumers through farm taps, rural service lines, rural projects and oil field projects along and in the vicinity of the pipe lines of Seller adjacent to and in the same general territory as Buyer's distribution systems in the cities, towns, villages and communities named herein, and Seller agrees to sell and deliver to Buyer, and (subject to Buyer's right to continue to use its present supply of gas from the Jackson Field as hereinabove set out) Buyer agrees to purchase and receive from Seller and pay Seller for all gas necessary to meet Buyer's requirements of gas for resale and distribution to said consumers supplied with gas by Buyer and being served through said farm taps, rural service lines, rural projects and oil field projects. All gas sold by Seller to Buyer for such purposes shall be sold and delivered under the same terms and conditions set out in this agreement except that Seller will deliver such gas to Buyer at the first tap line valve or valves located at the points of junction of Seller's pipe line facilities purchased by Seller from Buyer by deed of even date herewith, and Buyer's said

farm taps, rural service lines, rural projects, and oil field projects. Buyer shall install, operate and maintain at its own cost and expense the high pressure regulators, meters, low pressure regulators and such other equipment as may be necessary to measure such gas and enable Buyer to receive such gas at the varying pressures above specified; provided, however, that Seller shall always have the right to install meters and meter stations as it so desires at all or any of such delivery points.

## XVII.

To the extent that Seller has the right to do so, Seller hereby gives and grants to Buyer the right to install, maintain and operate at Seller's measuring stations at the delivery points provided for in Section II hereof, Buyer's pressure regulators, check meters and odorizing equipment. Buyer shall also have the right of ingress to and egress from said property of Seller for the purpose of operating and maintaining its property and equipment thereon and removing the same therefrom.

## XVIII.

Any notice hereunder shall be deemed to be fully given if in writing, and mailed by postpaid registered mail addressed to the respective parties at the addresses stated below or such other address as they shall respectively hereafter designate in writing, or if personally delivered at said respective addresses:

United Gas Pipe Line Company  
United Gas Building  
Shreveport, Louisiana

Willmut Gas & Oil Company  
Hattiesburg, Mississippi

## XIX.

Seller warrants generally the title to all gas delivered hereunder and agrees to indemnify Buyer from all suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of any adverse claims of any or all persons to said gas or to royalties or charges thereon.

## XX.

Each party shall have the right to examine the books, records, and charts of the other party at all reasonable times to the extent necessary to verify the accuracy of any statement, charge or computation made pursuant to the provisions of any section hereof. If any such examination reveals any inaccuracy in the charges theretofore made, the necessary adjustments in such charges and payments shall be promptly made.

## XXI.

If one or more or all of Buyer's gas distribution systems used for the distribution and sale of gas purchased from Seller hereunder are voluntarily sold or exchanged by Buyer, then and in such event Buyer agrees that it will cause the person, firm or corporation so acquiring such distribution system or systems to take and hold the same subject to this agreement and subject to the obligation to fully and faithfully perform all of the obligations created by this agreement in so far as the distribution system or systems disposed of are concerned, and Buyer further agrees that it will incorporate appropriate covenants to this effect in any act of conveyance or instrument of transfer which may be executed by it.

If all or any part of Seller's pipe line system through which the gas sold hereunder is delivered to Buyer is voluntarily sold or exchanged by Seller and Seller will

thereby be rendered unable to supply to Buyer any gas which it is obligated to supply hereunder, then, and in such event, Seller agrees that it will cause the person, firm or corporation so acquiring such property to take and hold the same subject to this agreement and subject to the obligation to fully and faithfully perform all of the obligations created by this agreement applicable to the property so sold or exchanged, and Seller further agrees that it will incorporate appropriate covenants to this effect in any act of conveyance or instrument of transfer which may be executed by it.

## XXII.

This agreement and the rights and obligations created hereunder are made subject to and shall conform to all valid present or future laws and rules, regulations and orders of any governmental agency having jurisdiction over the parties or the subject-matter hereof, especially the Federal Power Commission, and both parties agree to conform thereto.

## XXIII.

It is agreed that from and after the effective date hereof this contract shall constitute the sole and only contract between the parties hereto with reference to the sale and purchase of gas covered hereby, and shall supersede and be in lieu of all prior proposed contracts, agreements, and arrangements between the parties hereto whereby Seller is now delivering gas to Buyer for resale and distribution through the distribution systems and facilities referred to in this contract and for the other purposes specified herein, and both parties hereto shall at that time be released from any and all liabilities and obligations thereunder, except such liability as may have

arisen prior to the effective date hereof and except as to the obligation of Buyer to pay for all gas theretofore delivered to Buyer by Seller and for which payment has not been made.

XXIV.

This agreement shall be binding upon and inure to the benefit of the successor and assigns of each of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have executed this agreement on the day and year first hereinabove written.

UNITED GAS PIPE LINE COMPANY

(SEAL)

By (Signed) M. A. Abernathy  
Vice President

Attest:

(Signed) J. H. Miracle  
Secretary

WILLMUT GAS & OIL COMPANY

By F. M. Tatum (Signed)  
President

Attest:

(Signed) W. S. Tatum  
Secretary  
(SEAL)

**APPENDIX "C"**

The following portions of the Constitution of the United States and the Natural Gas Act are relevant:

**The Constitution of the United States:****Fifth Amendment**

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

**The Natural Gas Act:****Section 4 (a) and (b):**

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service facilities, or in any other respect, either as between localities or as between classes of service.

Sec. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification de-

manded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order:

Section 15:

§ 717n. Hearings; rules of procedure

(a) Hearings under this chapter may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(b) All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter. June 21, 1938, c. 556, § 15, 52 Stat. 829.

Section 19:

**§ 717r. Rehearings; court review of orders**

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

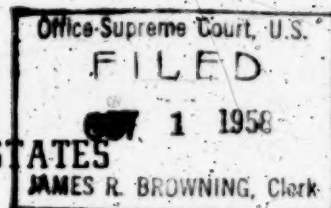
(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in

part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(c) The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. June 21, 1938, c. 556, § 19, 52 Stat. 831.

**23**

**LIBRARY**  
**SUPREME COURT. U. S.**  
**IN THE**  
**SUPREME COURT OF THE UNITED STATES**  
**OCTOBER TERM, 1958**



**Nos. 23, 25, and 26**

**UNITED GAS PIPELINE COMPANY, FEDERAL  
POWER COMMISSION, TEXAS GAS TRANSMIS-  
SION CORPORATION AND SOUTHERN NATURAL  
GAS COMPANY,**

*v.*

*Petitioners,*

**MEMPHIS LIGHT, GAS AND WATER DIVISION, CITY  
OF MEMPHIS, TENNESSEE, AND MISSISSIPPI VAL-  
LEY GAS COMPANY,**

*Respondents*

**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**BRIEF AMICI CURIAE OF THE MEMBER MUNICI-  
PALITIES OF THE NATIONAL INSTITUTE OF  
MUNICIPAL LAW OFFICERS**

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**OCTOBER, 1, 1958.**

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PIPELINE COMPANY, TEXAS GAS TRANSMIS-  
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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

**BRIEF AMICI CURIAE OF THE MEMBER MUNICI-  
PALITIES OF THE NATIONAL INSTITUTE OF  
MUNICIPAL LAW OFFICERS**

---

**Opinions Below**

The opinion of the United States Court of Appeals for  
the District of Columbia Circuit (R. 263-271) is reported  
at 250 F.2d 402. The Opinion of the Federal Power Com-  
mission (R. 225-247) is reported at 16 F.P.C. 19 and at  
14 P.U.R. 3d 279.

## **Jurisdiction**

The asserted grounds for jurisdiction are set forth in the Petitions.

### **Question Presented**

Should this Court reverse the Court below which, pursuant to *United Gas Pipe Line Company v. Mobile Gas Service Corporation*, 350 U.S. 332, found that the Commission has no jurisdiction over the filing for a proposed increase in rates when there has been no consent to said increase by the buyers.

### **Statutes Involved**

The applicable provisions of the Natural Gas Act, June 24, 1938, 52 Stat. 821 as amended, 15 U.S.C. 717, *et seq.* are printed at pp. 118-128, Appendix A. of the brief of the Federal Power Commission (FPC).

### **Interest of Amici Curiae**

The National Institute of Municipal Law Officers (NIMLO) is an organization of almost twelve hundred municipalities located in each of the 48 states, Alaska, the District of Columbia, and in the territories of Hawaii and Puerto Rico. Each member city acts through its chief legal officer, known variously as Corporation Counsel, City Attorney, City Solicitor, Director of Law, etc.

This Brief is filed pursuant to Rule 42(4) of this Court. The members of NIMLO are political subdivisions of states and this Brief is sponsored by their authorized law officers.

The issue at stake in the instant case is of vital interest to every municipality in the United States which purchases natural gas for its own consumption and whose residents are ultimate consumers of natural gas.

The members of NIMLO have been constantly alert, through their Standing Committee on Electric, Gas and

Telephone Rates to all facets of the regulation of sales of natural gas. In fact, NIMLO member cities acting as spokesmen for consumers of gas residing within their corporate limits were among the sponsors of the Natural Gas Act of 1938 when it was adopted<sup>1</sup>. Since then these member cities have participated in innumerable rate and certificate proceedings before the Federal Power Commission (FPC) as representatives of consumers living within their corporate limits.

Since the decision of the Court below greatly affects the member municipalities of NIMLO and their resident ultimate consumers and since the decision of the Court below, and the decisions of this Court which it applied and effectuated, correctly construe the Natural Gas Act and serve the public interest, NIMLO files this brief in support of the position of Respondents.

### **Statement of Facts**

The statement of facts is set forth by Memphis Light, Gas and Water Division, et al., Respondents, and will not be repeated herein.

### **ARGUMENT**

#### **I. The Court Below Has Correctly Construed the Mobile Decision**

Petitioners and amici curiae maintain that in this case (the "*Memphis*" case, as it is sometimes referred to herein) the Court below misconstrued the decision of this Court in the case of *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (the "*Mobile*" case). A reading of the *Memphis* decision, however, makes it abundantly clear that the Court below carefully considered the *Mobile* case and

<sup>1</sup> Hearings before Committee on Interstate and Foreign Commerce, House of Rep. 75th Cong., 1st Sess. on H.R. 4008, March 24-25, 1937, pp. 46, 58/59.

correctly applied the principles enunciated therein by this Court. The Court below clearly recognized that the case was practically "a close copy of *Mobile*" (R., p. 266) and after setting forth the similarities, correctly applied the facts in *Memphis* to the construction placed upon the Natural Gas Act by this Court in *Mobile*.

This case is premised upon a construction of Sections 4(d) and 4(e) of the Natural Gas Act with regard to what constitutes the required "consent" which will permit the FPC to accept a new rate schedule for filing. In *Memphis*, the Court held:

"The Supreme Court's opinion, in describing the relation of Sections 4 and 5, stated clearly that Section 4(d) was merely a requirement that the Federal Power Commission and the public be *formally notified* of any change made in any contract for the sale of gas by a natural gas company. 350 U.S. at 339. The notice contemplated by Section 4(d) is notice of the fact that the contracting parties have reformed their contract. Nothing in Section 4(e) gives the Commission authority to assist the parties in negotiating a new price term." (R., p. 268. Emphasis supplied.)

Thus, it was recognized by the Court below that Sections 4(d) and 4(e) were "notice" sections and that only upon agreement by the parties on the rate could an effective rate be changed. Clearly, the instant case falls within the rule set forth in *Mobile* since as the Court below pointed out:

"We know as a fact that not only Mississippi but Texas Gas and Southern Natural as well have not consented to the amount of the new rate, since all three of them are now opposing United's increase before the Commission."

Labored argument by *amici curiae* is not required to clearly demonstrate that this case should be affirmed by this Court.

The Court of Appeals in *Memphis* merely applied the law as laid down by the Supreme Court of the United States. The Circuit Court did not dispute this Court—it merely effectuated its decision.

Since Respondents will adequately cover and rebut the contentions of Petitioners regarding the clear legality of the decision of the Court below, the municipalities feel that a presentation to the Court of the effect of this decision upon the many thousands of consumers represented herein is their main duty. Although the Federal Power Commission has attenuated somewhat the dire predictions of insolvency, utter ruin of the gas industry and so forth, which were made in its Petition for Certiorari, it still makes reference to such catastrophic events in the event the *Memphis* decision is affirmed. It is submitted that the position is not well taken and that the harmful consequences referred to by the Solicitor General and *amici curiae* have not and will not materialize.

## **II. The Memphis Decision Is in the Public Interest and Is Not Detrimental to the Natural Gas Industry**

All Petitioners and *amici curiae* supporting their position have devoted much of their efforts to arguments purporting to prove that the impact of this decision is ruination of the industry. Nothing could be further from the truth. It is obvious that the most disturbing aspect of the decision to the companies is the prospect that unilateral rate increases will no longer be permitted and as a consequence the companies can no longer file for an increase in rates, have the rates made effective, collect such rates from the ratepayers and then refund at some distant future time the amount (which is usually considerable) which has been found by the Commission after hearing not to be justified.<sup>2</sup>

<sup>2</sup> In the case of sales for resale for industrial use only the natural gas company would retain the excessive exactions without refund. (See *Mobile Gas Service Corporation*, 12 F.P.C. 1422.)

Many companies (for example, Colorado Interstate Gas Company, one of the *amici curiae* herein) file rate increases upon rate increases with the result that millions of dollars (75 to 80 million to date in the case of Colorado Interstate) is collected from ratepayers subject to future refund.

It is not to be thought that we in any manner impugn the integrity of natural gas companies for seeking justified increases in rates, for the municipalities and the consumers whom they represent certainly desire healthy and financially strong companies. However, it is a well known fact that natural gas companies have sought higher profits and funds for capital additions by filing rate increases not based upon increases in costs but upon new methods of rate regulation or changes in the existing method, e.g., the manner of handling depreciation, the manner of handling compensation for produced gas, the manner of handling allocation of joint costs and so on. No matter how inflated the claims may be, under the procedures argued for by Petitioners and *amici curiae*, the Commission cannot under the Act reject such filings but can only suspend the effectiveness thereof for a period of not to exceed five months. *Mississippi River Fuel Corporation v. Federal Power Commission*, 202 F. 2d 899 (3d Cir., 1953). Thus, it is the *ratepayers* who have their rates increased commensurate with the increased amount of *dollars* sought by the company. If, after a hearing, the Commission finds certain claimed amounts to be invalid, then the company refunds the money with interest at 6 percent. However, this is wholly insufficient recompense to the consumer who has been deprived of the use of his money for several years.

All *Memphis* does is to require companies to obtain agreement of their customers on new rates prior to filing under Section 4 of the Act. A proceeding under Section 5 of the Act is still open to the companies. It would seem elemental that if a customer of a natural gas

company which in all cases are themselves either natural gas companies or distributing utilities was satisfied that the operating expenses of the natural gas company had increased to a point that relief through higher rates was necessary, then the purchaser would, with alacrity, agree to the new rate and the Commission could then adjudicate the justness or reasonableness of the new rate under Section 4 from the public interest standpoint. Thus, the fears of the companies are difficult to understand unless we conclude that the companies merely desire *carte blanche* to seek an increase in rates which might be based upon unrealistic rates of return, or unjustified operating expenses, etc., utilize the money collected pursuant to this increase and, if their proposal is ultimately denied, refund it in the far distant future.

### III. Consumers Will Not Suffer as a Result of the Memphis Decision

Petitioners and *amici curiae* state the proposition that consumers will suffer should the *Memphis* decision not be reversed. The *amici curiae* Columbia System companies take the position that should the *Memphis* decision stand then it would be difficult to negotiate with its supplier, Tennessee Gas Transmission Company. (Br. p. 19) This tremendous concern certainly should be able to negotiate with its suppliers who desire a rate increase and if such increase is justified, Columbia should be able to ascertain this fact and consent to the filing of the new rate. Beyond peradventure, any reasonable increase sought which is based upon accepted regulatory principles should be and undoubtedly would be acceptable to the customers of a natural gas company. The contentions to the contrary set out at length by Petitioners and *amici curiae* regarding inability to bargain, inability to ascertain with certainty what is a justified rate and what is not are merely suppositions on their part, the accuracy of which is highly doubtful.

That this is so is clearly shown by the number of rate case settlements in the Federal Power Commission. For example, the FPC stated at p. 108 of its 1955 Annual Report<sup>3</sup>

"... and the conference method in lieu of lengthy hearings, contributed greatly to the effectiveness of the Commission's program to speed up the processing of rate increase applications. This is borne out by the fact that of 39 cases disposed of only 2 required Commission decision after full hearing, *whereas 32 cases were satisfactorily concluded through conference procedure and short hearings.*" (Emphasis supplied.) (See also p. 111 of the Thirty-Fifth Annual Report of the Federal Power Commission, Fiscal Year Ended June 30, 1955, issued January 3, 1956, wherein the Commission lauds the conference procedure of settling rate increase applications.)

In fact, since the decision in *Memphis* was handed down by the Court of Appeals, the experience of the natural gas industry clearly shows that rate agreements can be obtained when the natural gas companies and the parties involved are reasonable. Witness the agreement by the parties on increased rates sought by Transcontinental Gas Pipeline Corporation (with 30 customers) (*Wall Street Journal*, April 15, 1958); in the case of *Southern Natural Gas Company*, Docket No. G-13258, Order issued April 18, 1958 (93 customers involved); by *Texas Gas Transmission Corporation* with 64 of its customers, including Respondents, (FPC Release No. 9643, January 20, 1958); in the case of *Natural Gas Pipe Line Company of America*, Docket No. G-13590, Order issued May 21, 1958; *Texas Illinois Natural Gas Pipeline Company*, Docket No. G-13591, Order issued May 21, 1958.

<sup>3</sup> Thirty-Fourth Annual Report of the Federal Power Commission, Fiscal Year Ended June 30, 1954, issued January 3, 1955.

These compromise agreements were arrived at *subsequent* to the filing for a rate increase by a natural gas company and were agreed to by all parties to the proceeding, including the customers. This is overwhelming evidence that actual agreements to justified rate increases have been entered into in the past and can and will be entered into in the future even where agreement to the new rates by municipalities, State Commissions and other intervenors were required.<sup>4</sup>

#### IV. The Procedure to be Followed Under the Memphis Decision Cannot Harm the Companies

Further recourse is taken by Petitioners and *amici curiae* to the proposition that should rates not be made effective immediately, then certain disaster to the industry will result. They also maintain that to have the justness and reasonableness of the proposed rate passed upon *before* the new rate is put into effect, as would be the procedure under Section 5(a) of the Act, also would be disastrous. However, this is contrary to the experience of companies regulated by State Commissions. As shown in "State Commission Jurisdiction and Regulation of Electric and Gas Utilities," Federal Power Commission, June, 1954 at page 3, all State Commissions with power to regulate rates of electric and gas utilities have the power to require prior authorization of rate changes or to suspend proposed rate changes, and to initiate rate investigations of privately owned electric and gas utilities. In many of these jurisdictions increased rates cannot be made effective until after hearing and final order by the regulatory Commission. These companies whose increased rates are suspended certainly have not become bankrupt. The possi-

<sup>4</sup> Also, the expansion of the natural gas industry has not been impeded by the *Memphis* decision as evidenced by the fact that in the 12 months ended June 30, 1958, the F.P.C. authorized natural gas facilities designed to add more than 2¼ billion cubic feet of daily delivery capacity to the nation's transmission systems at a cost of \$518,822,000.00. (F.P.C. Release No. 10,059, September 28, 1958.)

bility of bankruptcy by natural gas companies is so remote as to be absurd.

Although there have been attempts to explain away the position taken by the Chairman of the Federal Power Commission on January 3, 1958, the fact remains that he stated on January 3, 1958:

"I don't profess to have unequivocal answers to them, but I will repeat that I find it difficult to believe that the Memphis decision will ultimately cause the bankruptcy of an important part of the natural-gas pipeline industry and thereby prevent the public from getting the natural gas service it needs and deserves."<sup>5</sup>

He further said in the same speech that should the *Memphis* case be upheld, then under a Section 5(a) proceeding for a rate increase "I suspect we may find that a rate case under Section 5 can be processed in much shorter time than was ever thought possible."

Where does this leave the arguments propounded by the gas industry and supported by the Federal Power Commission regarding regulatory lag and bankruptcy? It is an ineluctable conclusion that the denial of unilateral filings to the natural gas industry will not be detrimental to the industry. In fact, it would aid the industry immensely since the unilateral filings of the past have created great instability and profound confusion in the industry. The sharp increase in recent years in rate filings and in rates can be directly attributed to this practice. The ability to pass on to the customers *whatever increased amount* in rates is *sought* without any justification at the time, has contributed greatly to the pyramiding of rates in the postwar period. Since the advent of skyrocketing

<sup>5</sup> An address by Jerome K. Kuykendall, Chairman, Federal Power Commission, before the New York Society of Security Analysts, New York, New York, January 3, 1958. See complete text appended hereto as Appendix A.

prices for gas in the producing fields, companies have had no incentive to bargain with sellers of gas—since all that has been required was to file an increase with the FPC and have such increase put into effect within a maximum of 6 months (and in some instances even sooner). Then the distributors and ultimately the consumers would pay the bill if and until the FPC entered an Order declaring certain claims unreasonable.

As Commissioner Connole so vehemently and clearly pointed out in his dissent in the case of *The Superior Oil Co.*, 23 PUR 3d 331 (1958):

“Plainly, the gas purchasing segment of the natural gas industry is running in a treadmill. And each turn of the wheel brings into view another and higher price that must be met if the buyer is only to stand still. And little hope appears that the crazy race against itself will be won unassisted.”

See also Commissioner Connole's dissent in *Seaboard Oil Co.* 19 F.P.C. 416, 427 (1958).

Thus, it would seem that the FPC in supporting the position of the industry is sanctioning such chaos. As this Court has frequently reminded the Federal Power Commission and as it so recently reminded it in the *Phillips*<sup>6</sup> case in directing the Commission to exercise its jurisdiction over all sales for resale in interstate commerce:

“Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act. *Federal Power Comm. v. Hope Natural Gas Co. supra.* (320 U.S. at 610).” 347 U.S. at 685.

<sup>6</sup> *Phillips Petroleum Company v. State of Wisconsin, City of Detroit, et al.*, 347 U.S. 672 (1954):

This protection is afforded the consumers through the Natural Gas Act as construed by the *Mobile* and *Memphis* cases. The companies will not suffer as a result of these decisions because any justified increases in rates would certainly be acceptable to customers and should the customers feel that the increases are not justified, then proceedings under Section 5(a) of the Act, embracing every aspect of due process under the Constitution, remain open to the natural gas companies.

### Conclusion

It is respectfully submitted that the *Memphis* decision of the Court below which merely effectuated the *Mobile* decision of this Court was eminently correct, that it will not have the dire effects attributed to it by the natural gas industry and by the Federal Power Commission, and that the judgment should be affirmed.

Respectfully submitted,

ROGER ARNEBERGH,  
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### Certificate of Service

We, Charles S. Rhyne and J. Parker Connor, attorneys for *amici curiae*, and members of the bar of the Supreme Court of the United States, do hereby certify that we have served upon the Solicitor General of the United States, an attorney of record for the Federal Power Commission and counsel of record for each other party, a copy of the foregoing brief *amici curiae* in opposition to the petitions for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit by depositing true and correct copies thereof in the United States mail, first class postage prepaid, on October 1, 1958, addressed as follows:

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## APPENDIX A

*Not to be released prior to  
1:00 p.m., January 3, 1958*

AN ADDRESS BY JEROME K. KUYKENDALL, CHAIRMAN FEDERAL  
POWER COMMISSION

BEFORE THE NEW YORK SOCIETY OF SECURITY ANALYSTS,  
NEW YORK, N. Y.

January 3, 1958

We are here today to discuss the severe case of "Memphis Blues" which now afflicts the natural gas industry. It is assumed that all of you are generally familiar with the decision of the Court of Appeals for the District of Columbia Circuit, rendered on November 21, 1957, which gave birth to these blues.

This decision completely overturned the established procedure which the entire natural gas industry, consumer interests, and the Federal Power Commission had thought, and the Federal Courts had assumed, was provided by section 4 of the Natural Gas Act. If this decision stands, a pipeline company cannot file a new rate even if the purchaser has agreed that this might be done. Under this decision, a different rate can be filed and become effective only if the purchaser has agreed in advance to the particular rate which is to be filed, or the Federal Power Commission has, under section 5 of the Natural Gas Act, completed an investigation and hearing, and issued an appropriate order.

The *Memphis* decision is an extension of the doctrine of the *Mobile* and *Sierra* cases, decided by the Supreme Court on February 27, 1956, wherein that Court held that the rate in a long term contract for the sale of gas and electricity could not be changed by the unilateral filing of a new rate subject to possible suspension by the Commission under section 205 of the Federal Power Act or section 4 of the Natural Gas Act. It should be pointed out that the facts in the *Mobile* and *Sierra* cases would, I believe, tend to cause any judge who was unfamiliar with the regulatory

process, to be sympathetic with the purchasers, the prevailing parties in those cases. Those cases are, in my opinion, excellent proof of the truth of the old adage that "hard cases made bad law."

It was quite generally thought that the effect of these two decisions could be overcome by a provision in the service agreements similar to the one which, in the *Memphis* case, has now been held to have no efficacy. If the *Memphis* case becomes the law of the land, it would seem to follow that all pipeline companies which presently are collecting increased rates subject to refund under section 4 must refund all of such sums to their customers. As of November 1, 1957, the total amount being collected subject to refund was about 217 million dollars per year, and the total amount subject to refund for the total time all existing suspended rates had been in effect was approximately the same amount. Indeed, it may rather logically be contended that all rate increases obtained at any time since the passage of the Natural Gas Act, by unilateral rate filings under section 4, are a nullity and must be refunded, with the possible exception of those cases which were settled by agreement of all parties and with approval of the Commission. I will come back to this subject in a few minutes.

What does the Federal Power Commission propose to do under such circumstances? The Commission will do all it can to obtain a review of this decision by the Supreme Court. The Solicitor General, with the cooperation of the Commission, has already filed with the Supreme Court a petition for certiorari. If certiorari is granted, the Commission will supply pertinent and factual information to the Solicitor General to assist him/in urging the Supreme Court to give some priority to this case. The Solicitor General and his staff appreciate the importance of this case.

I confidently expect that the Supreme Court will grant certiorari: I am hopeful that the Court will hear and decide this case during this term. Of course no one can make a positive prediction as to what the Court's final decision will be.

In the meantime, we will do our best, with due regard for the rights of consumers, distributing companies, pipelines, and producers, to maintain equilibrium in this vast segment of our nation's economy. The *Memphis* decision will not be binding on the Commission until the mandate from the Court of Appeals reaches us. This mandate will not issue unless the Supreme Court denies certiorari. If the Supreme Court grants certiorari, no mandate will issue until the Supreme Court has finally disposed of the matter.

There is ample precedent for the Commission not to accept the doctrine of a court decision as applicable to other parties in other cases until that particular decision has become final. The *Phillips Petroleum* case is a recent example. The Court of Appeals held that Phillips was a natural gas company in May of 1953. The Supreme Court affirmed that result in June of 1954. During that interim the Commission did not attempt to force Phillips and other independent producers to comply with the Natural Gas Act. To do so would have been fruitless as well as inconsistent with the Commission's position in the Supreme Court. Undoubtedly any independent producer would have resisted any effort of the Commission to assert jurisdiction over him during that period and would have utilized appropriate court action for that purpose. The only result of such untimely efforts by the Commission would have been the creation of a great volume of litigation.

The *Memphis* decision presents an analogous situation. So long as that decision is not final, any appealable order issued by the Commission which is based on the principle involved in *Memphis*, whether in accord with, or contrary to it, will be appealed. The creation of such a mass of litigation clearly would not be in the public interest, and can, I hope, be avoided.

Nevertheless, the Commission, in an effort to avoid unnecessary litigation will not endeavor to irreparably prejudice any rights any one may now have, or hereafter acquire, if the *Memphis* decision becomes the law of the land. Although the Commission does not recognize *Memphis* as final or binding in any manner at this time, the Commission nevertheless has not ignored the possibility that it may become so.

In an order issued this week, the Commission declined at that time to pass on a motion to dismiss a pipeline rate case, filed pursuant to section 4. In the same order, however, the Commission ordered the pipeline company to post a bond for the entire amount of the increase or supply other satisfactory evidence of ability to refund the entire amount. Personally, I believe that by such action, we have done the best that could be done, in this difficult situation, to protect the public interest.

What is in store for investors in natural gas pipeline securities if the *Memphis* case is not reversed? I do not believe that this industry necessarily must become bankrupt if this decision stands.

The demand for natural gas is as great now as it was before the *Memphis* decision. There is still a market and a seemingly insatiable demand for the product. Unlike an old overcoat or automobile, old gas supplies, previously used, cannot be made to serve longer. Where there is a demand and a supply, sales and purchasers will be made. Thus the essential ingredients for a healthy industry remain.

Some pipeline companies are hopeful that they can reach a settlement of their pending cases with their customers. The City of Memphis itself has been an active and willing participant in such negotiations. Numerous distributing companies fully realize that neither they nor their customers want a refund which bankrupts the long distance transporter and terminates or even jeopardizes future service.

A number of the pipeline companies which would have to refund large sums would also receive large refunds from other pipelines from whom they have purchased. Some would receive more than they would have to refund. All companies which had to make refunds would have the right to obtain a refund of the resultant over-payment of income taxes.

The opinion in *Memphis* directed the Commission to reject the rate schedules filed by United Gas Pipeline Company. It follows, as was mentioned earlier, that all companies similarly situated would have to do likewise, but there is another principle, not mentioned or considered

by the Court, which, it seems to me, may come into play. Would the constitutional provision against confiscation of property protect a regulated company in a business affected with a public interest from refunding money to the extent that it thereby became bankrupt and thus was no longer able to render necessary service to the public?

I doubt very much if the Court comprehended the magnitude of the result of what it was doing, and realized that in addition to dealing with the price of gas to the City of Memphis, it was setting a precedent involving, as of now, more than two hundred million dollars in refunds.

Consequently, I doubt if the Court considered the constitutional point just mentioned, or considered whether or not United Gas Pipeline Company, or any company similarly situated, would be entitled to have a *quantum meruit* recovery for gas delivered, if it is not entitled to the filed rate. Those questions were not covered in the *Memphis* decision. I don't profess to have unequivocal answers to them, but I will repeat that I find it difficult to believe that the *Memphis* decision will ultimately cause the bankruptcy of an important part of the natural gas pipeline industry, and thereby prevent the public from getting the natural gas service it needs and deserves.

A number of pipeline companies had expected to raise substantial sums of money for expansion during 1958. As you know, such expansion must be approved by the Federal Power Commission before it can take place. In other words, FPC has found that it is in the public interest that the facilities of certain companies be enlarged, and has found such expansion to be feasible. It would be regrettable indeed, if this needed expansion did not take place as scheduled. The public needs the additional and improved service which would thereby be rendered, and at this time, particularly, our economy needs the benefit of the expenditure of these many millions of dollars for plant construction.

Necessity is the mother of invention. Let us all do our part in a great effort to keep the natural gas industry alive, strong, and growing. I suspect that we may find that a rate case under section 5 can be processed in much shorter time than was ever thought possible. We know

that in such a case, the pipeline company would supply all the data that our staff would request, as soon as it possibly could. When the customer companies realize that additional supplies of needed gas cannot be forthcoming until the pipeline company is first granted reasonable rates, it would seem that they would likewise cooperate to bring the case to a speedy conclusion. The Commission and its staff will, I know, do everything they can to expedite their work, so that our economy will not suffer unnecessarily, and to the end that the public will get the increased natural gas service it requires.

All of us have heretofore considered that section 5 was enacted for the purpose of providing a method of lowering rates, and have not considered its use in passing on applications to increase rates. It may be found that our rules and procedures should be revised in view of this changed situation. I am sure the Commission will revise its procedures in any way that is found to be proper and necessary to expedite action, and in so doing would be limited only by existing law and protection of the public interest.

Perhaps you people who play a part in the marketing of pipeline securities can revise your procedures and your customary way of doing business and find ways of doing your part in keeping the natural gas industry healthy and able to render service. I urge you to try your utmost to do so. In times of economic crisis, the psychological factor may tip the scales one way or another. Let us see that we who are in a position to affect psychological reactions say and do those things which will prevent a panic where no panic is called for.

The effect of the *Mobile*, *Sierra*, and *Memphis* decisions can be corrected by appropriate legislation, although such legislation could only operate prospectively. The Commission is already on record as favoring such legislation, having taken such action long before the *Memphis* decision. Such a recommendation will appear in the Commission's annual report which is now being printed. Congress has many times demonstrated that it can act speedily when the need to do so has been shown. The Federal Power Commission will support such legislation,

and I for one do not now know of any interests or groups which would oppose it if they ascertain and understand the facts.

There may be some good which will come out of the present difficult situation. Some people, both in the natural gas industry and in the political field, have oversimplified the various problems of the natural gas industry. They have believed, or have acted as though they believed, that each issue merely presented the question of "whom are you for?—the consumer or the industry?" Such persons have, for example, opposed a rate increase as an inherently evil thing, without any regard to the question of whether a rate increase was necessary in order for service to be rendered, and have opposed any legislation supported by any segment of the industry, apparently on the theory that if the industry wants it, it's bad for consumers. (Let me make it clear that I referred to "some people" only, in the preceding sentence.)

The *Memphis* decision is forcing such persons to face reality and to admit that, after all, a pipeline company must remain solvent if it is to render service. There seems to be good reason to hope that the present difficult situation will ultimately lead to creation of a better environment in which to dispose of regulatory problems.

It is always difficult for a member of a regulatory commission to speak on a subject of current interest in his field. If he succeeds in avoiding any comments which could, in or out of context, be deemed as an indication of what his commission may do in certain cases in the future, he also succeeds in boring and disappointing his listeners. If he succeeds in saying anything of interest or value to his audience, he subjects himself to the criticism that he has pre-judged issues before him. In what I have said to you today, I have tried to make a fair appraisal of the existing serious situation.

I am now ready to submit to questioning from you.

24

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**JAMES R. BROWNING, Clerk**

**In the Supreme Court of the  
United States**

**OCTOBER TERM, 1958**

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**Nos. 23, 25 and 26**

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**UNITED GAS PIPE LINE COMPANY, FEDERAL POWER  
COMMISSION, TEXAS GAS TRANSMISSION COR-  
PORATION, and SOUTHERN NATURAL GAS COM-  
PANY,** *Petitioners,*

*v. B*

**MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.**

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**ON WRITS OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT**

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**BRIEF AMICUS CURIAE OF THE  
STATE OF WASHINGTON**

---

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---

**BRIEF AMICUS CURIAE OF THE  
STATE OF WASHINGTON**

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This *amicus curiae* brief is filed by the State of Washington, sponsored by its Attorney General, in support of the judgment of the Court of Appeals, 250 F. 2d 402.

**ISSUE**

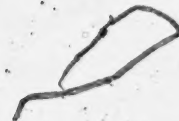
The single question which will be discussed is the effect which the proviso in § 4(e) of the Natural

Gas Act (52 Stat. 822, 15 U. S. C. 717c (e)) has upon the construction of § 4(d) of the Act.

The Federal Power Commission would have this court construe § 4(d) of the Act as a grant of power to a natural gas company to file with the Commission rate schedules increasing its rates for jurisdictional sales of natural gas, notwithstanding the fact that its customers have not agreed to the specific amount of the increase. It is our purpose by this brief to bring to the attention of this court the incompatibility of § 4(d) so construed with the general purposes of the Act and with other express provisions of the Act, as well as serious constitutional questions which would necessarily result.

These consequences stem from the proviso of § 4(e) of the Act:

“ \* \* \* *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; \* \* \* ”




## INTEREST OF THE STATE OF WASHINGTON

All natural gas used in the State of Washington is brought into the state by Pacific Northwest Pipeline Company, a natural-gas company as defined by the Act, and "jurisdictional" sales are made to public utility companies engaged in distributing and selling this natural gas to ultimate consumers within the state. These distributors are subject to regulation of their rates and charges by the Public Service Commission of the State of Washington. While rate increases by the Pacific Northwest Pipeline Company are borne in the first instance by these distributors, their impact is and must necessarily be directly upon the consumers. It could only be otherwise if the distributors were earning in excess of a fair rate of return prior to such increases in their cost of rendering service to their customers.

The term "industrial gas" as used throughout this brief refers only to gas sold by the pipeline company for resale for industrial use only, under a rate schedule or contract provision relating solely to such gas.

The sale of natural gas by Pacific Northwest Pipeline Company to the several public utility distributors for resale for industrial use only is substantial, both in quantity and in dollar amounts.

For the year 1957 the distributors selling gas to ultimate consumers in the State of Washington purchased 294,077,445 therms of industrial gas, as com-



pared to 123,809,814 therms of other gas, at a cost of \$7,850,252.00 for the industrial gas and \$4,456,702.00 for the other gas. Of the total gas purchased for resale in the State of Washington during this year, more than 70% in quantity and more than 63% in dollar cost was industrial gas.

Comparable figures for the 12-month period ending July 31, 1958, are as follows:

	<i>Industrial</i>	<i>Other</i>
Gas purchased—		
Therms .....	332,503,457.	159,294,555
Cost of gas purchased ..	\$9,423,007.00	\$5,795,649.00
Percentage of total volume .....	68%	32%
Percentage of total cost .....	62%	38%

The foregoing statistics are from public records in the files of the Washington Public Service Commission. Details with respect to volume and cost of gas purchased by the several distributors are reproduced in Appendix "A" hereto.

Under the statutory scheme of regulation in the State of Washington, distributors are required to obtain a certificate of public convenience and necessity setting forth the area or areas within which service is to be rendered.<sup>1</sup> Accordingly, the distributor has a complete or limited monopoly in its service area. At the present time each distributor has a complete monopoly in its service area or areas. The public interest requires that resale rates by these

<sup>1</sup> RCW 80.28.190.

monopoly distributors to ultimate consumers be effectively required.

Regulation of resale rates for industrial gas by the Washington Public Service Commission will be completely frustrated if regulation of the prior sale of this gas in commerce by the Federal Power Commission is not effectively regulated.<sup>2</sup> Effective regulation by the Washington Public Service Commission of resale rates for other gas will be seriously impaired if sale of industrial gas in commerce is not effectively regulated, because of the practical difficulty of any attempt to allocate physical facilities and the cost of service between the two classes of service, and the impossibility of avoiding discrimination between the two classes of customers.

It is self-evident that, without a known and dependable market for industrial gas in the State of Washington, it would not have been possible to bring other gas to commercial and residential consumers at a price within their reach. Large sums were spent to convert industrial facilities to the use of natural gas and it is essential, if industry is to prosper and remain competitive, that these rates have some measure of stability and be effectively regulated. With the Commission accepting filings of increased rates under § 4(d) not agreed to by the customers, this stability cannot be maintained, and

<sup>2</sup> Such prior sales are beyond the reach of the Washington Public Service Commission because of constitutional limitations. See *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298, 44 S. Ct. 544 (1924), and *Public Utilities Comm. v. Attleboro Steam & Electric Co.*, 273 U. S. 83, 74 S. Ct. 294 (1927).

on the other hand, experience justifies the assertion that increased rates at a level making them unjust, unreasonable and discriminatory may be expected to be imposed and required to be paid for long periods of time.

### SUMMARY OF ARGUMENT

Because of the proviso in § 4(e) of the Natural Gas Act prohibiting the Commission from suspending any rate change classification for service for the sale of industrial gas, any rate increases for industrial gas permitted to be filed under § 4(d) of the Act must become effective thirty days from the date of filing. There is no way this result can be avoided, no matter how unfair, unreasonable or discriminatory such increased rates may be. The rates would have to be paid and collected for several years and could only be corrected by a final order of the Commission entirely prospective in its operation. Any such final order could be rendered nugatory by a new filing again increasing rates for industrial gas. Regulation of rates for industrial gas moving in commerce would be rendered almost completely ineffective.

It is clear from the provisions of § 1 of the Natural Gas Act that Congress intended industrial gas to be regulated to the same extent as other gas and the public interest requires that it be so regulated. If § 4(d) is construed as the court below construed it, to permit the filing of increased rates only

when specifically agreed to by the customers of the pipeline companies, the foregoing consequences will be avoided.

### ARGUMENT

Should § 4(d) of the Act (U. S. C. 717c (d)) be held to authorize the filing of rates by a pipeline company not specifically agreed to by its customers, the necessary consequence of the proviso of § 4(e) would be to permit the pipeline company to give itself a new legal rate for industrial gas by the mere act of filing and the expiration of the period of 30 days, without hearing, findings, opportunity to suspend, or right of review. At the expiration of 30 days after such filing such rates would become the only legal rates, deriving their status and vitality from the statute, until changed by a new filing or by a final order of the Commission after review proceedings under § 4(e). Existing and new customers would be compelled to pay these rates and the natural gas company would be compelled to collect them. They could be reviewed under the proceedings provided in § 4(e) to determine whether they complied with the standards set up in §§ 4(a) and 4(b) of the Act, but any final corrective order would be prospective only. The Commission has advised this court that regulatory proceedings before the Commission under § 5(a) of the Act have required an average of 36 months (three years) to complete, with a range of from 10 months to 73 months (six years). System-wide proceedings

have averaged 62 months (five years).<sup>3</sup> Based upon this experience, it is reasonable to expect that increased rates for industrial gas, however unreasonable or discriminatory, would have to be paid for long periods of time. By the legally available expedient of filing another schedule of increased rates under § 4(d), any relief obtained by a Commission order after review could be effectively nullified 30 days after it was obtained. Such a construction of § 4(d) is inconsistent with the basic purpose and with other express provisions of the Act, and is contrary to the mandate of the due process clause of the Fifth Amendment to the Constitution, and to Article 1, Sec. 8 of the Constitution, because it would constitute an unlawful delegation of legislative power.<sup>4</sup> Such a construction should be rejected because:

<sup>3</sup> Commission brief, p. 97. On p. 98 the Commission says that in order to make any sizeable inroads into the time now required to complete a major § 5(a) rate proceeding, it would be necessary to have the cooperation of all parties. Up to this time § 5(a) proceedings have been proceedings to compel rate reductions. The situation with respect to proceedings under § 4(e) to review filings under § 4(d), increasing industrial gas rates, would likewise actually be rate reduction proceedings. The pipeline would already be enjoying its increase as a result of the mere act of filing and any change resulting from regulatory review and final Commission order would deprive the pipeline company of the increase only prospectively. It cannot be expected that such proceeding would differ substantially in length of time required or that any more cooperation would be received from the pipeline companies than has been experienced with respect to § 5 rate reduction proceedings. Proceedings for increases under § 5 may be expected to have full cooperation of the pipeline companies.

<sup>4</sup> The Commission brief, p. 80, Footnote 52a, says that during the calendar year 1956, the Commission ordered refunded to the gas purchasers over \$63,000,000.00 paid to pipeline companies which had been based on rates placed into effect subject to refund under § 4(e) and ultimately found unlawful by the Commission. It would be unrealistic to expect the pipeline companies to be any less predatory in filing increased rates for industrial gas not subject to suspension or refund.

<sup>5</sup> A statute should, if fairly possible, be so construed as to avoid not only the conclusion that it is unconstitutional, but also grave doubts on that score. *Interstate Commerce Commission v. Oregon-Washington R. & Nav. Co.*, 288 U. S. 14, 53 S. Ct. 266, 77 L. ed. 588; *United States v. Shreveport Grain & Elevator Co.*, 287 U. S. 77, 53 S. Ct. 42, 77 L. ed. 175; *Northwestern Bell Teleph. Co. v. Nebraska State R. Co.*, 297 U. S. 373, 56 S. Ct. 536, 80 L. ed. 810.

## I. INCONSISTENT WITH BASIC PURPOSE OF THE ACT

(a) *To prevent exploitation of consumers by pipelines.* The primary aim of the Act, in the words of this court, is "to protect consumers against exploitation at the hands of natural gas companies." *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. at 610, 64 S. Ct. at 291; *Phillips Petroleum Co. v. State of Wisconsin*, 347 U. S. 672, 683, 74 S. Ct. 794, 800-801. If a natural gas company is permitted to deal with rates for natural gas sold for resale for industrial use completely free of restraint, except only by action of the Commission after 36 to 60 months of delay, which action may be prospective only and not retroactive, the State Commission will be helpless to protect consumers of industrial gas, and seriously hamstrung in endeavoring to protect consumers of other gas.

(b) *To enable states to effectively regulate intra-state rates.* The legislative history of the Act reveals that it was the purpose of Congress to provide regulation of the transportation and sale of natural gas in commerce which the State Commissions were unable to reach because of constitutional limitations, as delineated in *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298, 44 S. Ct. 544 (1924), and *Public Utilities Comm. v. Attleboro Steam & Electric Co.*, 273 U. S. 83, 47 S. Ct. 294 (1927). See HR Rep. No. 709, 75th Cong., 1st Sess., pp. 1-2. If

regulation of rates for industrial gas is effectively nullified by permitting natural gas companies to file under § 4(d) of the Act without specific agreement of its customers to the rates so filed, a large segment of the commerce in natural gas which was thought to be regulated by the Act will have been substantially removed from regulation by judicial construction.

(c) *To protect the public interest against monopoly.* The act grants a monopoly, or limited monopoly, to natural gas companies. § 3 prohibits the importation or exportation of natural gas into or from the United States by any person without an order of the Commission authorizing it to do so. § 7 requires a natural gas company to obtain a certificate of public convenience and necessity from the Commission before the construction, extension or operation of its facilities, and provides that the Commission may determine the service area to which each authorization under the section is limited.

We have heretofore brought to attention the fact that the monopoly of Pacific Northwest Pipeline Company in the State of Washington is complete and absolute. All of the natural gas used in the State of Washington moves into the State in inter-state commerce through the pipeline facilities of, and is sold by, this company. Far more than one-half of this commerce is in gas sold for resale for industrial use only. To grant such a monopoly to an instrumentality of commerce and fail to provide

price protection for any appreciable segment of that commerce would be contrary to public policy and to the public interest. More than that, it would be contrary to express provisions of the Constitution, as will be hereinafter more particularly discussed.

## II. INCONSISTENT WITH OTHER EXPRESS PROVISIONS OF THE ACT

Such a construction is in opposition to other express provisions of the Act and, in context with the Act as a whole, must be rejected.

(a) *Scope of regulation.* § 1(a) of the Act (U. S. C. 717(a)) declares that the transportation and sale of natural gas "for ultimate distribution to the public" is affected with a public interest. This language embraces all such gas so transported and sold, and necessarily includes gas transported and sold for resale for industrial use. The subsection goes on to provide that Federal regulation of such transportation and sale in interstate and foreign commerce is necessary in the public interest.

§ 1(b) deals with exclusions, but it negatives any notion of excluding gas sold for resale for industrial use from regulation by expressly reaffirming that the Act shall apply to the transportation and sale in inter-state commerce of natural gas " \* \* \* for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and and to natural gas companies engaged in such transportation or sale \* \* \* "

(b) *Regulatory standards—just and reasonable rates.* §4(a) of the Act (U. S. C. 717c (a)) provides that all rates and charges by a natural gas company shall be “just and reasonable” and any such rate or charge which is not just and reasonable “is declared to be unlawful.” Under the Commission’s proposed construction of § 4(d), we would be confronted with the anomaly of whatever rate the natural gas company chose to file for industrial gas being the only “legal” rate, notwithstanding its being unjust and unreasonable, and consequently unlawful under the preceding § 4(a).

(c) *Regulatory standards—uniform and non-discriminatory rates.* Perhaps not as obvious, but equally irreconcilable, would be the resulting contradiction between § 4(b) and § 4(d) as so construed. § 4(b) provides in effect that rates of natural gas companies shall be uniform as to persons, and nondiscriminatory “as between localities or as between classes of service.” No matter how discriminatory, as between localities and between classes of service rates filed under § 4(d) might be, they would be and remain the only legal rates for long periods of time, extending from three to five years. The State Commissions would be completely helpless to correct the discrimination resulting to ultimate consumers of both industrial and other gas.

(d) *Hearing provisions of the Act.* In every other provision of the Act where substantive rights may be adversely and directly affected by exercise

of powers delegated by Congress to the Commission, the Act expressly stipulated the condition that the power may be exercised only after hearing.

§ 3: "The Commission \* \* \* unless after opportunity for hearing

and

"\* \* \* may from time to time after opportunity for hearing

§ 5(a): "Whenever the Commission after hearing \* \* \*

§ 7(a): "Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest \* \* \*

§ 7(b): "\* \* \* after due hearing

§ 7(c): "In all other cases the Commission would set the matter for hearing and would give reasonable notice of hearing thereon to all interested persons \* \* \*

§ 7(f): "The Commission after hearing had upon its own motion or upon application \* \* \*

§ 8(a): "The Commission, after notice and opportunity for hearing, may \* \* \*

§ 9(a) "The Commission may, after hearing, require \* \* \*

§ 14(b): "The Commission may, after hearing, determine \* \* \*

These provisions for hearing provide no more than the procedural due process which is required under the Constitution. The care with which this right is expressly stipulated and preserved throughout the

Act argues strongly against the idea that there could have been any intention to permit natural gas companies to file new rates under § 4(d) for industrial gas which would after 30 days become clothed with the force of law and become the only legal rates, absent the consent of the customer to the specific rates so provided, or a realistic right to have such rates become effective only after hearing, findings and reviewable order by the Commission.

### III. CONTRARY TO THE PROVISIONS OF THE FIFTH AMENDMENT AND OF ARTICLE 1, § 8 OF THE CONSTITUTION

For all practical purposes natural gas companies would fix their own rates for industrial gas completely free for periods of years from any necessity that they be just, reasonable, uniform and non-discriminatory. Those rates which they chose to fix would be legal rates made so under the authority of Congress acting under its power to "regulate" commerce. They would be established without hearing, findings, order, opportunity for suspension, or opportunity for review, and without any power in the Commission to make any order with respect to such rates except prospective, and consequently without any right to retribution by Commission order if the Commission should, after the lapse of a long period of time, determine that the rates were unjust, unreasonable or discriminatory. It is clear that in realistic and practical operation and effect, the natural gas companies would be given the power

to unilaterally establish rates which become and for long periods remain the only legal rates, and thereby become the recipients of a power which Congress cannot delegate to them because of the constitutional prohibition against such delegation.

While dealing with a factual situation entirely different from that before us, the language used by Mr. Justice Sutherland, speaking for a majority of this court in condemning the Bituminous Coal Conservation Act of 1935, aptly characterizes § 4(d) of the Natural Gas Act if construed as the Commission would have it. We therefore quote that language:

"The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. The record shows that the conditions of competition differ among the various localities. In some, coal dealers compete among themselves. In other localities, they also compete with the mechanical production of electrical energy and of natural gas. Some coal producers favor the code; others oppose it; and the record clearly indicates that this diversity of view arises from their conflicting and even antagonistic interests. The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily, a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the busi-

ness of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. at p. 537, 79 L. ed. 1584, 55 S. Ct. 837, 97 A. L. R. 947; *Eu- bank v. Richmond*, 226 U. S. 137, 143, 57 L. ed. 156, 159, 33 S. Ct. 76, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 192; *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U. S. 116, 121, 122, 73 L. ed. 210, 213, 214, 49 S. Ct. 50, 86 A. L. R. 654." *Carter v. Carter Coal Co.*, 298 U. S. 238, 80 L. ed. 1160, 1189.

## CONCLUSION

§ 4(d) of the Natural Gas Act should not be interpreted as authorizing natural gas companies to file rate increases thereunder, unless such rate increases are specifically agreed to by their customers. In this way, conflict between the provisions of this section and other provisions of the Act, insofar as industrial gas is concerned, will be avoided, as well as serious constitutional questions. The decision under review should be affirmed.

Respectfully submitted,

STATE OF WASHINGTON

JOHN J. O'CONNELL,

*Attorney General,  
State of Washington.*

FRANK P. HAYES,

*Assistant Attorney General,  
State of Washington*

## APPENDIX "A"

NATURAL GAS PURCHASED BY DISTRIBUTORS FOR  
RESALE IN THE STATE OF WASHINGTON

Year 1957

Company	Industrial Gas	Other Gas
Cascade Nat- ural Gas Cor- poration .....	Therms ... 55,999,582 Cost ..... \$1,512,080	20,519,646 \$814,741
Eastern Wash- ington Natural Gas Company*	Therms .. ..... Cost ..... ..	123,850 \$6,374
Northwest Nat- ural Gas Com- pany† .....	Therms .. 35,196,478 Cost ..... \$928,495	8,973,777 \$302,155
Pacific Natural Gas Company.	Therms .. 40,304,671 Cost ..... \$1,111,070	526,073 \$25,251
Washington Natural Gas Company .....	Therms .. 127,391,004 Cost ..... \$3,366,321	60,769,452 \$2,088,408
Washington Water Power Company .....	Therms .. 35,185,710 Cost ..... \$932,283	32,897,016 \$1,219,773

Year Ending July 31, 1958

Cascade Nat- ural Gas Cor- poration .....	Therms .. 74,481,310 Cost ..... \$2,113,718	25,562,008 \$1,039,265
Eastern Wash- ington Natural Gas Company*	Therms .. ..... Cost ..... ..	351,937 \$15,395

\* From August 13, 1957, date service commenced.

† Name changed from Portland Gas &amp; Coke Company.

<b>Northwest Nat-</b>			
<b>ural Gas</b>	<b>Therms ..</b>	<b>44,823,310</b>	<b>14,365,933</b>
<b>Company</b>	<b>....Cost .....</b>	<b>\$1,272,344</b>	<b>\$485,742</b>
<b>Pacific Natural</b>			
<b>Gas Company</b>	<b>Therms ..</b>	<b>29,158,798</b>	<b>804,784</b>
	<b>Cost .....</b>	<b>\$833,941</b>	<b>\$38,629</b>
<b>Washington</b>			
<b>Natural Gas</b>	<b>Therms ..</b>	<b>147,561,724</b>	<b>78,350,254</b>
<b>Company</b>	<b>....Cost .....</b>	<b>\$4,168,808</b>	<b>\$2,774,865</b>
<b>Washington</b>			
<b>Water Power</b>	<b>Therms ..</b>	<b>36,478,315</b>	<b>39,859,639</b>
<b>Company†</b>	<b>....Cost .....</b>	<b>\$1,034,196</b>	<b>\$1,471,753</b>

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† Name changed from Spokane Natural Gas Company.

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1957**

**FEDERAL POWER COMMISSION, PETITIONER**

**v.**

**MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.**

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA  
CIRCUIT**

**J. LEE RANKIN,**

*Solicitor General,*

**GEORGE COCHRAN DOUB,**

*Assistant Attorney General,*

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*General Counsel,*

*Federal Power Commission,*

*Washington 25, D. C.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1957

No. —

FEDERAL POWER COMMISSION, PETITIONER

v.

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled cause on November 21, 1957.

## OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (App. A, *infra*, pp. 31-42) is not yet reported. The opinion of the Federal Power Commission (R. 225-237) is reported at 16 F. P. C. 19 and at 15 P. U. R. 3d 279.

## JURISDICTION

The judgment of the Court of Appeals was entered on November 21, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and

(1)

Section 19 (b) of the Natural Gas Act, 15 U. S. C. 717r (b).

#### QUESTION PRESENTED

Whether, under this Court's decision in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332, the filing of schedules increasing a natural gas company's rates for jurisdictional sales of natural gas must be rejected by the Federal Power Commission where, although the purchasers have not agreed to the specific amount of the increase, the existing agreements with the purchasers reserve the right to the natural gas company to change its rates, subject to the Commission's power of review under Section 4 (e) of the Natural Gas Act.<sup>1</sup>

#### STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, 15 U. S. C. 717 *et seq.*, are set out in Appendix B, *infra*, pp. 43-47.

#### STATEMENT

In the course of administrative hearings on new rate schedules which United Gas Pipe Line Company, a natural gas company subject to the Natural Gas Act, had filed with the Federal Power Commission under Section 4 (d) of the Act, *infra*, p. 44, respondents Memphis Light, Gas and Water Division, and

---

<sup>1</sup> Should certiorari be granted, we reserve the right to raise the question of whether Memphis Light, Gas and Water Division and the City of Memphis, which were not parties to the service agreements here involved, may validly challenge the filing of the new schedules on the ground that such filing constituted a unilateral attempt to change a contract.

Mississippi Valley Gas Company filed motions to reject the schedules on the ground that they constituted an attempt unilaterally to increase contract rates without the purchasers' consent, in violation of this Court's holding in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332 (R. 143-148, 162-168). In denying the motions, the Commission held that, even though the purchasers had not agreed to the amount of the increase, *Mobile* was inapplicable since United's service agreements with its purchasers contemplated and agreed to such filings by United (R. 225-237). Reading *Mobile* as prohibiting a natural gas company, which was selling gas under service agreements, from increasing rates by filing new schedules under Section 4 (d) unless the purchasers had agreed to the precise increase as well as to the filing under Section 4 (d), the court below reversed (App. A, *infra*, pp. 31-42).

**Background.** When the Natural Gas Act was enacted in 1938, the Commission permitted the natural gas companies subject to its jurisdiction to file their sales contracts as rate schedules so that the rates then in effect would be legal rates. These contracts typically had been individually negotiated with each purchaser, with the result that the contracts, and the rates contained therein, varied greatly in amount as well as form. However, shortly after the Act's passage, the Commission initiated a program of system-wide tariffs in order to make the rates simple and uniform and to eliminate price discrimination among customers. To that end, the Commission, in August 1940, circulated among the pipe-line companies for comment

"Tentative Instructions for Preparing and Filing F. P. C. Rate Schedules" under which the contractual rate schedules would be converted to prescribed tariff forms. The advent of World War II made it impossible to go forward with this undertaking; however, a substantial number of pipe-line companies cooperated with the Commission by voluntarily converting their rate forms from contract to tariff.<sup>2</sup>

Thereafter, in April 1948, the Commission, noting that the experience under the voluntary conversions indicated "the feasibility and desirability of such a change and that benefits and advantages may be expected to result to the public and natural gas companies" (13 Fed. Reg. 2046), again proposed amendment of its rate regulations to establish the tariff system. 13 Fed. Reg. 2045-2050. Upon receiving suggestions and comments from interested persons, the Commission revised the proposed regulations and again invited comments. 13 Fed. Reg. 5214. After the receipt of further suggestions, the Commission made additional revisions in the proposed regulations and, in October 1948, issued the regulations as Order No. 144. 13 Fed. Reg. 6371 *et seq.*<sup>3</sup>

Order No. 144, which has been in effect since that time and which, with a few minor amendments not here relevant, is still operative (18 C. F. R. 154.1 *et*

<sup>2</sup> Prior to this conversion, the companies had on file with the Commission separate rate schedules consisting of almost 7,000 pages. The substituted tariffs comprised only 888 pages. See 13 Fed. Reg. 6371.

<sup>3</sup> For further summaries of the history of Order No. 144, see 13 Fed. Reg. 6371-72; *United Gas Pipe Line Company*, 16 F. P. C. 10, 11-12.

q.),<sup>4</sup> requires the conversion of all rate contracts into tariff-and-service-agreement form, as well as the restatement of all rates in cents or in dollars and cents per unit.<sup>5</sup>

In a tariff-and-service-agreement method of rate making, the buyer and seller do not agree in advance on a specific rate for a definite period of time through individual contracts tailored to a particular transaction. Rather, the seller files rate schedules of general applicability, at which rate it sells the commodity to all its customers within a given zone or area. In addition, it enters into service agreements with its customers which provide for the amount of gas to be sold and the duration of the sale. These agreements do not contain a price term, but merely refer to the effective rate at a particular time.

In prescribing the form and contents of the tariffs and rate schedules thereafter to be filed (Sections 154.31 *et seq.*), Order No. 144 provides in Section 154.38 (d) ("Statement of Rate"):

<sup>4</sup>Order No. 144 now applies only to pipeline companies, special provision having been made for independent producers and the Commission's regulations concerning the latter's rates. C. F. R. 154.91 *et seq.*

<sup>5</sup>For special situations, however, the Commission reserved the right to permit the filing of contracts as rate schedules. See Section 154.52. In addition, under Section 154.85, a contract already on file as an effective rate schedule might be continued in effect as an executed service agreement to the extent that its provisions "are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff." The only exception permitted to the requirement of restatement is where price provisions cannot be so restated without effecting a change in rates or charges. See Section 154.82.

(1) Except as permitted in §§ 154.52 and 154.82, all rates shall be clearly stated in cents or in dollars and cents per unit. Only the rates and charges to be used in current billing shall be included in the rate schedules.

(3) No rule, regulation, exception or condition, such as tax, commodity price index, wholesale price index, purchased gas cost adjustment clauses or other similar price adjustments or periodic changes shall be included in the rate schedule or any other part of the tariff which in any way purports to effect the modification or change of any rate or charge specified in the rate schedule, or the substitution therefor of any other rate or charge: *Provided, however,* a natural-gas company may state in the service agreement or in rate schedules filed pursuant to § 154.52 that it is or will be its privileges under certain specified conditions, to propose to the Commission a modification, change or substitution of the then effective rate or charge: *Provided, further,* that no such clause may effectuate a change in an effective rate or charge except in the manner provided in Section 4 of the Natural Gas Act, as amended, and the regulations in this part.

And, in Section 154.40, the Order provides:

There shall be submitted as part of the tariff an unexecuted copy of each form of service agreement. The service agreement forms shall provide for insertion of such items as the name of the purchaser, service to be rendered, area to be served, maximum obligation to deliver, delivery points, delivery pressure, applicable rate

schedules by reference to the tariff, effective date and term, and identification of any price agreements being superseded.

The pipelines accepted the provisos in Section 154.38 (d) (3) as meeting their objections that the order as proposed would affect substantive rights which could not be modified in a general rulemaking proceeding,\* and they have complied with the Order.<sup>7</sup> As of December 1957, there were 1,100 service agreements filed with the Commission, compared to 80 contracts filed as rate schedules under Sections 154.52 and 154.85 of the Order (*supra*, p. 5, fn. 5).

*The Present Proceedings.* United's sales of gas to Texas Gas Transmission Corporation, Southern Natural Gas Company, and Mississippi Valley Gas Company, as well as sales to United's other customers, were made under service agreements and a tariff filed with the Commission in accordance with Order No. 144, *supra*, pp. 4-7. As prescribed by that Order, no rate was fixed in the service agreements; instead the agreements, which were in the standard form contained in United's tariff (see *supra*, p. 5-7), provided (R. 64):

\*The provisos did not appear in earlier drafts of the Order. See, e. g., 13 Fed. Reg. 5216.

<sup>7</sup> Review of Order No. 144 was sought only by United and Michigan Consolidated Gas Company. See *United Gas Pipe Line Co. v. Federal Power Commission*, 181 F. 2d 796 (C. A. B. C.), certiorari denied, 340 U. S. 827; *United Gas Pipe Line Co. v. Federal Power Commission*, D. D. C. Civil Action No. 4680-50. United, however, agreed to dismiss the district court proceeding as part of the settlement approved by the Commission in *United Gas Pipe Line Co.*, 13 F. P. C. —, Op. No. 277, issued November 2, 1954.

All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule (the appropriate rate schedule designation is inserted here), or any effective superseding rate schedules on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached thereto and filed with the Federal Power Commission which are by reference made a part hereof.\*

On September 30, 1955, United filed new rate schedules with the Commission under Section 4 (d) of the Act, *infra*, p. 44, increasing, as of November 1, 1955, its company-wide rates for sales of natural gas which were subject to the Commission's jurisdiction. By order issued October 26, 1955, the Commission, stating

\* Of the seven service agreements or contracts here involved (three with Mississippi and two each with Texas Gas and Southern), two, one with Southern dated May 7, 1951, and the other with Texas Gas dated April 16, 1945, do not explicitly contain this provision. However, the provision is part of these contracts by reference under the terms of a "settlement tariff" filed by United as of August 1, 1954, with the consent of the purchasers, Southern and Texas Gas, as well as with the approval of the Commission. Cf. *United Gas Pipe Line Co.*, 13 F. P. C. —, Op. No. 277, issued November 2, 1954. The settlement tariff provided as a general term and condition that each Buyer must "enter a contract with Seller (United) under Seller's applicable standard form of Service Agreement" (Tr. 496). The only exception provided is for contracts in effect on August 1, 1954, but even such contracts were to be considered as service agreements to the extent not "superseded by or in conflict with the rate schedules and General Terms and Conditions of the Tariff" (Tr. 496). Since the pricing provision of the two contracts would be in conflict with the "any effective superseding rate schedules" provision of the General Terms and Conditions, the latter superseded the former.

that the rate increases had not been shown to be justified and "may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful" (R. 116), found that it was "necessary and proper in the public interest \* \* \* that [it] enter upon a hearing concerning the lawfulness of the rates \* \* \*"

(R. 116-117). Accordingly, the Commission, as authorized in Section 4 (e), *infra*, pp. 44-45, ordered a public hearing and suspended the new rates, other than those for resale for industrial use only,<sup>9</sup> for the statutory term of five months, *i. e.*, until April 1, 1956 (R. 117).

At various times thereafter, Memphis Light, Gas and Water Division, Mississippi, Texas Gas and Southern, among others, sought to intervene in the proceedings.<sup>10</sup> In their petitions for intervention, each showed that it purchased substantial quantities of gas directly, or indirectly through another company, from United;<sup>11</sup> the intervention petitions then

<sup>9</sup> The new rates for sales for resale for industrial use only were not suspended because of the proviso in Section 4 (e), *infra*, pp. 44-45, and they became effective as of November 1, 1955, as provided in United's filings. The rate increases which were suspended became effective as of April 1, 1956, pursuant to an appropriate motion by United, subject, however, to refund as provided in Section 4 (e).

<sup>10</sup> The City of Memphis has the power to regulate rates and consequently was entitled to intervene under Section 1.8 of the Commission's Rules of Practice and Procedure by filing a notice of intervention (R. 120-121, 141-142).

<sup>11</sup> The Division alleged that it purchased all its gas requirements for its local distribution system in Memphis and Shelby County Tennessee, from Texas Gas, a substantial, direct purchaser of gas from United (R. 119). Mississippi, according to its petition, makes large volume purchases of gas from United

asserted that the new rates "may be unjust, unreasonable, unduly discriminatory and preferential" so as to place an undue burden upon the petitioner (R. 119), or claimed that its participation in the proceeding would be in the public interest (see R. 130-132, 135). By order issued January 31, 1956, the Commission found that participation of these parties in the proceeding "may be in the public interest" and accordingly permitted them to intervene (R. 141-142).

Hearings concerning the lawfulness of the new rates began on February 6, 1956 (R. 132), and were still in progress when this Court on February 27, 1956, decided the *Mobile* case. Until that time, neither Memphis nor Mississippi had suggested that the Commission lacked authority to accept United's rate schedules for filing; instead they, together with many of United's customers, claimed only that the increased rates were unjustified or unreasonable.

On March 22 and 28, Mississippi and Memphis moved the Commission to reject the new schedules for the sales to the three purchasers here involved on the ground that they constituted unilateral changes in contract rates which, under the ruling in *Mobile*, could not be accepted by the Commission for filing under Section 4 (d) (R. 143-148, 162-166).<sup>12</sup> Following the receipt of responses and the hearing of oral argument,

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indirectly through Texas Gas and Southern in addition to its direct purchases (R. 131).

<sup>12</sup> In addition, they requested the Commission to prohibit the increased rates from becoming effective as of April 1, 1956, and to require refund of the purported increased rates for industrial use.

the Commission denied these motions in an opinion and order issued on October 2, 1956 (R. 225-237).

In its opinion, the Commission pointed out that, while this Court in *Mobile* had held that a unilateral rate filing must be rejected in the situation there presented, i. e., where a specific contract rate was fixed for a period of years with nothing in the contract indicating directly or by implication that the seller could unilaterally change the rate, the Court had gone on to note that a rate change may be filed under Section 4 (d) if it is "one which the natural gas company has the power to make" (see R. 228-229). The Commission found that the reference to "any effective superseding rate schedules on file with the Federal Power Commission" in United's service agreements manifested an intent that the purchasers pay the rates contained in the schedules in effect from time to time, including schedules filed by United under Section 4 (d) (R. 231-232).<sup>13</sup> Accordingly, the Commission concluded that "the filing of United and this proceeding relating thereto are wholly consistent with the" holding in *Mobile* (R. 230).

The Court of Appeals reversed and remanded (App. A, *infra*, pp. 31-42). Accepting the Commission's finding that, by the phrase "any effective superseding rate

<sup>13</sup> In their answers to the motions to reject, both Southern and Texas Gas noted their understanding that the service agreements reserved to United the right to file rate changes with the Commission under Section 4 (d), and at the same time left them free "to oppose any such changed rates in a proceeding before the Commission in respect thereto initiated under Section 4 (e) or 5 (a) of the Act" (R. 168-169; see also R. 171-172, 173-174). Mississippi did not deny that such was its understanding of its service agreements.

schedules" the parties had intended to give United the right to file new schedules under Section 4 (d) (App. A, *infra*, pp. 37, 39-40), the court held that such consent alone was not sufficient to permit new rate filings under that section (App. A, *infra*, pp. 37-42). In its opinion the court declared that, before a seller of natural gas could make such rate filings, it must, under *Mobile*, also have the purchaser's agreement to the specific amount of the increase. It said (App. A, *infra*, p. 38):

\* \* \* The notice contemplated by Section 4 (d) is notice of the fact that the contracting parties have reformed their contract: that the seller has offered, and the buyer has agreed to, a particular new price to be effective no less than thirty days after the Commission is notified of the change. 350 U. S. at 339-40. It is only at this point—*after* the parties have negotiated privately a new price term—that the Commission, under Section 4 (d) and (e), in any way becomes involved with the rate changing process. \* \* \*

\* \* \* the seller must bring to the Commission a negotiated agreement. And that agreement to the new rate must be as specific in its terms as was the previous contractual agreement to the rate schedule sought to be superseded.

#### REASONS FOR GRANTING THE WRIT

The decision of the court below—based, we submit upon an unwarranted expansion of this Court's decision in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332—upsets the Federal Power Commission's and the natural gas industry's long-

standing construction of Section 4 of the Natural Gas Act, and the general use of service-agreements-plus-tariffs of the type involved in this case. If allowed to stand, the ruling will undo years of work in the rate review field; will place an intolerable burden upon the Commission to initiate and terminate expeditiously Section 5 (a) proceedings to alleviate to some extent the resulting damage which will be done to the gas industry; will adversely affect all pipeline companies which have recently received or have pending rate increases under Sections 4 (d) and 4 (e); and will tend seriously to impair the financial ability of such companies effectively to serve both the consuming and producing ends of the natural gas industry. On the other hand, the position for which we contend will have none of these harmful consequences, and at the same time will be fair and just to the consumer of natural gas. Such a situation—particularly since it stems from a gravely erroneous interpretation of a recent decision of this Court—urgently calls for review here.

1. *The court below has misread the Mobile decision and extended it far beyond its scope.*

In *Mobile*, it was claimed that companies subject to the Natural Gas Act could, without the purchaser's assent, file rate increases under Section 4 (d) of the Act, even though the existing rates were specifically fixed by the contract with the purchaser. This Court, however, held, that Section 4 of the Act did not grant to natural gas companies the right to change such contract rates unilaterally; but the *Mobile* case was

concerned only with this problem of specific, fixed, contract rates.

The Mobile contract prescribed a specific rate for the entire period of the contract and contained no provision for the filing of rate increases by the selling company. The seller nevertheless undertook to increase the contract rate by filing with the Commission new schedules, purportedly in accordance with Section 4 (d). The basic argument advanced in support of the Commission's acceptance of this filing was that Section 4 (d) accorded to the seller the right unilaterally to file increases without regard to the terms of the original contract or the purchasers' failure to assent to the increase, subject of course to the Commission's power temporarily to suspend the increase and permanently to disallow any part of it not justified by the seller. In rejecting this claim that Section 4 (d) vested in the seller, *vis-a-vis* the purchaser, rights over and above those set out in their contract, the Court held (350 U. S. at 339-340):

On its face, however, § 4 (d) is simply a prohibition, not a grant of power. It does not purport to say what is effective to change a contract, any more than § 4 (c) purports to define what constitutes a "contract" that may be filed with the Commission. The section says only that a change *cannot* be made without the proper notice to the Commission; it does not say under what circumstances a change *can* be made. Absent the Act, a unilateral announcement of a change to a contract would of course be a nullity, and we find no basis in the language of § 4 (d) for inferring that the mere

imposition of a filing-and-notice requirement was intended to make effective action which would otherwise be of no effect at all. In short, § 4 (d) on its face indicates no more than that otherwise valid changes cannot be put into effect without giving the required notice to the Commission. To find in the section a further purpose to empower natural gas companies to change their contracts unilaterally requires reading into it language that is neither there nor reasonably to be implied." [Italics in original.]

The thrust of this holding, particularly the comments that Section 4 (d) is "simply a prohibition, not a grant of power" (350 U. S. at 339) and that that Section "on its face indicates no more than that otherwise valid changes cannot be put into effect without giving the required notice to the Commission" (350 U. S. at 339-340), is that Section 4 (d) gave no rights to the seller in addition to those it already had under its contract. Since " \* \* \* there is nothing in the structure or purpose of the Act from which we could infer the right, not otherwise possessed and nowhere expressly given by the Act, of natural gas companies unilaterally to change their contracts" (350 U. S. at 343-344), the only way in which the fixed rates there involved could be increased under Section 4 (d) was by mutual consent. Thus, *Mobile* was based not upon the broad ground that sales were being

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<sup>14</sup> The excerpt set out in the text contains the dispositive ruling of the Court. In the remainder of the opinion (350 U. S. at 340 ff.) the Court explains why it could not accept the further contentions advanced by the petitioners in support of their basic position.

made pursuant to a general agreement, as the court below apparently believed, but rather upon the specific circumstance that the particular contract prescribed a specific rate and contained no contractual mechanism for effectuating rate changes.

Here, in contrast, the purchasers had agreed in the service agreements, as the court below recognized (App. A, *infra*, pp. 37, 39-40), that United could file rate changes with the Commission, which would become effective 30 days after filing unless suspended, and would be subject to disallowance to the extent not shown to be justified. This was the general understanding within the natural gas industry of the effect of the type of service-agreement-plus-tariff which is involved here.<sup>15</sup> Consequently, the Commission properly concluded that the rate changes were "one(s) which the natural gas company had the power to make" (R. 228-229).<sup>16</sup> See also, *infra*, pp. 19, 20, 26, fns. 18, 19, 25.

<sup>15</sup> The entire industry agreed with the Commission that such a right to modify by filing might validly be reserved by contract. It was in response to industry objections that the Commission inserted the "provisos" in Section 154.38.(d) (3) of Order No. 144, *supra*, pp. 5-7, which permitted the companies to reserve the right in their service agreements to change rates by filing new schedules. The pipelines concluded that their rights under their rate contracts with their purchasers (*supra*, pp. 3, 7), would not be substantially affected and were willing to exchange the various specific adjustment clauses and rate increase provisions in these contracts for the reservation of a right in their service agreements to file rate changes under Section 4 (d).

<sup>16</sup> In the court below, respondents argued that the instant case is indistinguishable from *Mobile* on the facts, since there was involved in that case, in addition to the asserted statutory right, an implied agreement (comparable to the express understanding here involved) that United had the right to change

Moreover, at the same time that the Court held in *Mobile* that Section 4 (d) did not give the seller any rights with regard to the making of rate changes over and above those which it had independently thereof, it also ruled that that Section did not place further restrictions (other than of notice and filing with the Commission) upon the exercise of "otherwise valid" rights to make rate changes. This is clear from the Court's statement, among others, that "§ 4 (d) on its face indicates no more than that otherwise valid changes cannot be put into effect without giving the required notice to the Commission." <sup>17</sup> (Emphasis added.)

the contract rates by filing new schedules under Section 4 (d). The short answer to this argument, even assuming that such a contractual right might have been implied in *Mobile* (which we doubt), is that in *Mobile* the argument was neither advanced in support of the propriety of United's rate filing nor passed upon by this Court, and formed no part of the Court's ruling in that case.

<sup>17</sup> In the same vein, the Court stated:

[The Act] purports neither to grant nor to define the initial rate-setting powers of natural gas companies (350 U. S. at 341)

The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act (*id.* at 343)

\* \* \* except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act \* \* \* (*ibid.*)

There is nothing in the remainder of the Court's opinion which, when read in context, is inconsistent with these statements. See, also, *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U. S. 348, the companion case.

It is therefore plain that the court below misread *Mobile* when it ruled that, although the service agreements in this case did not condition United's exercise of its reserved rights to file new rates upon obtaining the purchasers' assent, nevertheless such assent was required by Section 4 (d) as a condition to the validity of rate filings under that Section, and the lack of assent required the rejection of United's new schedules. Equally erroneous is the court's necessary conclusion that, in the absence of assent to the amount of the increase, the only mechanism by which pipeline companies can obtain an increase in rates is through a Commission proceeding under Section 5-(a), at the end of which the increase, if allowed, may take effect prospectively only.

2. *The Commission, in passing upon United's new schedules, was exercising a proper rate-review function.*

(a). The conclusion below is not advanced by the reasoning that, since purchasers are free to oppose the increase, the Commission would have "to arbitrate a dispute when the seller sought to raise its price [and] the Federal Power Commission has not been given that arbitration function by statute" (App. A, *infra*, pp. 39-40). It does not follow that, because the purchasers may seek to oppose the new rate schedules, the Commission in passing on them would be performing arbitration functions, and not its normal rate-review duties.

This is demonstrated by the situation where a company which has been selling gas pursuant only to applicable rate schedules, without having entered into

any agreement as to price with its purchasers, undertakes to file new rates.<sup>18</sup> This Court in *Mobile* recognized that such a filing could be made under Section 4 (d). See 350 U. S. at 343. In that situation, if the Commission should set the matter for hearing under Section 4 (e), not only may the purchasers seek to intervene in opposition to the new rates, but the Commission, by permitting such intervention, is authorized—and indeed charged with the duty—to pass on the lawfulness of the new rates. This is so because, while the purchasers' opposition to the new rates may be motivated by selfish interests, they are permitted to intervene in the Commission proceeding only if their "participation in the proceeding may be in the public interest." See Section 15 (a) of the Natural Gas Act, *infra*, p. 46. And even when the purchasers are permitted to intervene, the Commission's review of the new rates is not for the purpose of resolving the conflicting *private* interests of the seller and its purchasers, as would be the case in an arbitration proceeding, but solely to determine whether the new rates

<sup>18</sup> Such a sales arrangement would involve the "*ex parte*" method of rate changing referred to by this Court in *Mobile* (350 U. S. at 343) as an alternative to a contract-made rate. This is, in fact, the method followed by United in this case, since there will never be a pipeline sale of gas without at least agreement between the parties as to quantities and duration. Such an agreement, as in the case of the present service agreements, would typically make reference to the rate schedule currently on file with the Commission to establish the lawful price governing the sale, although it would not contain a price term as such. *Mobile* recognizes, in sharp contrast to the decision below, that an *ex parte* method of rate making is lawful and contemplated by the Natural Gas Act, in the absence of contract-provided rates.

are lawful (*i. e.*, rates which are not "unjust, unreasonable, unduly discriminatory or preferential") and hence may be permitted to become effective in the public interest.

Such is precisely the situation here. Since the "any effective superseding rate schedules" provision of the service agreements, invoked by United in filing its new schedules, relates to the rates of a natural gas company subject to Commission regulation, the provision plainly refers to the rates which the Commission permits to become effective under the Act.<sup>19</sup> The Commission action contemplated by the provision was a review to determine the lawfulness of the new rate in accordance with the standards prescribed by the

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<sup>19</sup> While the court below accepted the view that the "any effective superseding rate schedules" provision in the service agreements was intended to give United the right to file rate changes under Section 4 (d) without the purchasers' assent to the amount thereof (App. A, *infra*, pp. 37, 39-40), respondents Memphis and Mississippi will probably claim, as they did in the court below, that in light of *Mobile* the provision may properly be read as applicable only to rate changes made pursuant to Section 5 (a). But since they recognize that the provision embodies an agreement to pay the rates which are made effective in a legal manner (see Brief for Petitioners in C. A. D. C. No. 13,666, at p. 29), this claim falls with their broad reading of *Mobile*. For it is only if the filing of rate changes with the purchasers' assent to the filing, albeit not to the amount of the change, is barred by the Act that such a rate change is excluded from this provision of the service agreements. On the other hand, if this is a permissible method of changing rates under the Act, then such a change would be legally effective, and hence embraced within the provision which (it may be noted) includes "any effective superseding rate schedules" (emphasis added).

statute.<sup>20</sup> As a matter of fact, this was the very type of proceeding which the Commission had initiated on United's new schedules before any petitions for intervention were filed and which was in progress, without objection from any of the parties including Memphis and Mississippi, when motions to reject United's new schedules were filed. *Supra*, pp. 7-11.

In addition, the fallacy in the comparison below to an invalid arbitration is shown by the source of the purchasers' right to oppose the new rates. This right stems not from an explicit provision to that effect in the service agreements but rather from the statutory requirement that all Commission proceedings—including proceedings to review rates instituted under Section 4 (e), as well as under Section 5 (a)—are subject to the intervention provisions of Section 15 (a). Thus while the Commission is not required by statute to institute a Section 4 (e) proceeding with regard to all new filings under Section 4 (d), and therefore United's new rates could theoretically have become effective merely upon compliance with the requirements of Section 4 (d),<sup>21</sup> the fact is that when the Commission set the new schedules for hearings

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<sup>20</sup> With infinitesimal exceptions, the Commission has, in actual practice, suspended all non-industrial rate increases filed by pipelines under Section 4 (d); as a result, all such increases are reviewed by the Commission in Section 4 (e) hearings. Thus, during the fiscal year ended June 30, 1957, over \$95,000,000 in pipeline annual suspendible increases were filed with the Commission. Of this amount, only \$100,000 was permitted to go into effect without suspension and hearing. These latter increases were in virtually every case unopposed.

<sup>21</sup> As an integral part of their argument that the agreement contemplated an unauthorized arbitration proceeding, respond-

as authorized in Section 4 (e) (see footnote 20, *supra*), then the purchasers were free to petition for intervention under Section 15 (a) on the ground that their participation might be in the public interest. That the parties so understood their service agree-

ents insisted in the court below that United's rate filings were "proposals" (see Brief for Petitioners in C. A. D. C. No. 13,666, at pp. 14-16), which this Court held in *Mobile* (350 U. S. at 342) could not be filed under Section 4 (d). In support of this argument, respondents refer to the Commission's use of similar phraseology in selected portions of its opinion. However, inasmuch as the Commission's opinion also refers to "rate filings" (R. 143, 162) and "increased rates" (R. 143, 145, 162, 165), it is plain that the true nature of United's filings cannot be determined by reference solely to the terminology used in the Commission's opinion. If terminology alone were conclusive, it would be highly relevant that respondents, in their motions before the Commission to reject, referred to United's filings as "rate increases." (See R. 143, 148, 162, 166.) It is clear that the filings were of actual rates and not of mere rate proposals, in view of the parties' understanding of the nature of the filings (see *supra*, pp. 9-11, 16), as well as the consequences which flowed therefrom—that, as filed by United, the new rate schedules were to be effective as of November 1, 1955; that, absent Commission suspension, the new rates would have become effective on that date; that the increased rates for sales for resale of industrial use only did become effective on that date; and that the rates for other sales did, over respondents' opposition (*supra* p. 9, fn. 9), become effective as of April 1, 1956. Thus, since the service agreements gave United the right to file unilateral changes in rates, the rate filings here come not within the "proposal" language of *Mobile* relied on by respondents, but rather within the language immediately preceding and following (350 U. S. at 342):

Section 4 (d) provides \* \* \* for notice to the Commission of any "change \* \* \* made by" a natural gas company, and the change is effected, if at all, not by an order of the Commission but solely by virtue of the natural gas company's own action. If the purported change is one the natural gas company has the power to make, the "change"

ments with United is evident from the fact that, when the Commission set the new rates for hearing, this was the basis on which the purchasers applied for leave to intervene, and the Commission permitted them to do so. *Supra*, pp. 9-10.<sup>22</sup>

Consequently, the function which the Commission undertook to exercise with regard to United's new rate schedules, and which the service agreements contemplated, was clearly not that of an arbitrator resolving a conflict between private disputants, but rather the duty, with which the Commission is charged by the Natural Gas Act, of determining in the public interest whether the new rates met the statutory requirements. It is true that reference was made to the current rate schedules in the service agreements between the parties. This, however, is a matter of historical interest only, since the very service agreements which referred to these schedules as the original rates simultaneously recognized the sel-

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is completed upon compliance with the notice requirement and the new rate has the same force as any other rate—it can be set aside only upon being found unlawful by the Commission. It is thus no more a "proposed" rate than any other rate, all of which are equally subject to Commission review.

<sup>22</sup> The lower court's misunderstanding of the impact of the purchasers' right to oppose the new rates is further illustrated by the situation where the Commission, having been furnished information by the pipeline company, invokes a Section 5 (a) proceeding to determine whether the company's rates should be increased. See 350 U. S. at 341, 344-345. There, also, the purchasers may intervene under Section 15 (a) and oppose changes in rates. Yet there is no question that in such a proceeding the Commission is performing an authorized rate-review function, and not an arbitration.

ler's right to file rate changes which would be subject to hearing, temporary suspension, and disallowance if unjustified.<sup>23</sup> In these circumstances it was plain error for the court below to conclude that, since the purchasers were free to oppose the new rates fixed by United, the service agreements improperly attempted to vest the Commission with an arbitration function.

(b). Contrary to the suggestion of the majority of the court below (App. A, *infra*, fn. 3, pp. 41-42), the rates fixed by the Commission as the result of the Section 4 (e) proceeding which was being held here are no different from those which would have been fixed after a Section 5 (a) proceeding, which the court thought should be held. While the courts have allowed a "zone of reasonableness" in passing on rates fixed by regulatory commissions, so that rates within that zone are not upset, the Power Commission's methods do not employ a similar latitude in gas pipeline company rate cases. The Commission utilizes precisely the same standards in proceedings initiated under each Section—4 (e) or 5 (a)—in determining just and reasonable rates. Under each, the Commission permits a pipeline to charge only the minimum rates which will reimburse it for its expense and provide it with a return on its rate base adequate to maintain its financial integrity and attract capital. Once cost of service

<sup>23</sup> Further buttressing the identification with an *ex parte* filing is the fact that no rates as such are contained within the four corners of the service agreements. Rather, the service agreements refer to separate filings of rate schedules of general applicability, and consequently the effect of the filing of new schedules is merely to supersede the old rates but not in any way to amend or change the service agreements.

(including allowance of a fair return on the amount prudently invested) is determined, the reasonableness of any rate per unit of service is readily apparent from a comparison of the revenue it will produce with the cost of service per unit. This test is applied uniformly in Sections 4 (e) and 5 (a) review proceedings.

This Court recognized in *Mobile* (350 U. S. at 341, 343) that Section 4 (e) provides for basically the same hearing and review procedures—and the same standard for rates—as does Section 5 (a), supplemented by the Section 4 (e) suspension powers which are not available under Section 5 (a). There is therefore no reason to fear (see App. A, *infra*, fn. 3, pp. 41–42) that use of Section 4 (d) and (e) will “debilitate” Section 5 (a) by providing the sellers with a means of “avoiding” the “more stringent proof requirements of Section 5 (a)”. That danger does not exist. The basic procedure, standards, and results of a proceeding initiated under Section 4 are the same as those initiated directly under Section 5 (a), since Sections 4 (d) and (e) and 5 (a) are not alternative rate-changing procedures but rather “simply parts of a single statutory scheme” (350 U. S. at 340–341). “The basic power of the Commission is that given it by § 5 (a)” and “Section 5 (a) would of its own force apply to *all* the rates of a natural gas company, whether long-established or newly changed, but in the latter case the power is further implemented by § 4 (e). All that § 4 (e) does, however, is to add to this basic power, in the case of a newly

changed rate or contract (except "industrial" rates), the further powers (1) to preserve the status quo pending review of the new rate by suspending its operation for a limited period, and (2) thereafter to make its order retroactive, by means of the refund procedure, to the date the change became effective. The scope and purpose of the Commission's review remain the same—to determine whether the rate fixed by the natural gas company is lawful" (350 U. S. at 341, italics in the original). It is under these governing rules that the Commission proceeds.

### 3. *The question is of the utmost importance.*

The form of service-agreement-plus-tariff involved in this case has become general throughout the natural gas industry under the Commission's Order No. 144 (*supra*, pp. 4-7),<sup>22</sup> and the holding below has seriously upset the stability prevailing throughout that industry since 1948 when that Order established the system of service-agreements-plus-tariffs (*supra*, pp. 3-5).<sup>23</sup> Having surrendered the specific rate in-

<sup>22</sup> While the intent in all cases was the same, the formulation of the reservation in the service agreements has differed. Thus, the form currently used by Northern Natural Gas Company (with the consent of all its purchasers) provides:

It is agreed that Northern shall have the right to make, and to file with the Federal Power Commission in accordance with Section 4 of the Natural Gas Act, changes in rates and new rates or rate schedules; provided, however [the purchaser] shall have the right to protest any such changes in rates and new rates or rate schedules before said Commission, and to exercise any other rights it may have with respect thereto under the Natural Gas Act, as amended, or as it may be amended.

<sup>23</sup> The reserved right to file new schedules under Section 4 (d) became an essential element to the stability of the pipe-

crease and adjustment clauses of their superseded contracts, the pipelines must be able to meet steadily rising costs by periodically filing new schedules under Section 4 (d), which even after initial suspension become effective subject to refund under Section 4 (e). As of December 31, 1957, there were in effect, subject to refund, new schedules increasing rates of 34 pipeline companies by about 175 millions of dollars per year. Under the decision below, these schedules should have been rejected<sup>2</sup> and the companies re-

line companies when they converted to service agreements. *Supra*, pp. 5-7. While a pipeline could enter a long term contract at a fixed rate in an individual special case, it would not enter such contracts with all its customers, for that would impose upon it all the risks of rising costs and unforeseeable contingencies for the entire five, ten, or even twenty year life of the service agreements. Before it would be practicable to enter such long term contracts with all its customers, the company would have to fix rates at a level sufficiently high to cover all contingencies; the Commission, however, probably would not be willing to accept such rates as lawful in light of the cost picture when the rates were filed. In contrast, based on their assumed right to file new schedules under Section 4 (d), the companies have been fixing rates reflecting current costs and making adjustments as required. At the same time that the pipelines thus retained needed flexibility in adjusting rates, the purchasers have been protected from arbitrary action by the companies, since new rates could not become fully operative unless filed with the Commission and found by it to meet the standards of lawfulness prescribed by the Act. In short, actual experience under Order No. 144 shows that the right reserved in the service agreements to file new schedules under Section 4 (d) contributed to, rather than upset, the stability of the industry.

<sup>2</sup> The holding below also raises questions as to the validity of comparable rate increases since 1948 in which the Commission proceedings have been finally terminated. If refund of these increases were to be required, the immediate financial impact upon the pipe lines would be almost tripled.

quired to refund all of the money collected thereunder."

The resulting impact upon the financial integrity of several pipeline companies is aggravated by the fact that the only way in which a pipeline company's rates may be increased under the ruling below, absent the purchasers' assent to the increased amount,<sup>27</sup> is pursuant to a proceeding brought by the Commission under Section 5 (a).<sup>28</sup> Under that section the companies will not be able to obtain needed rate increases for an extended period of time, nor can any increases be made retroactive. As this Court recognized in *Mobile* (350 U. S. at 342-343), and as we have already noted (*supra*, pp. 5, 18, 25), Section 5 (a) does not contain

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<sup>27</sup> Many of these schedules have been in effect subject to refund for periods longer than a year, so that the amount which would have to be refunded, if refund were ordered, is actually substantially in excess of 240 millions of dollars. Moreover, the amount to be refunded by each of the pipeline companies affected would vary widely depending on the amount of increases involved and the time they have been in effect under bond. Thus, five pipelines would have to refund in excess of 191 millions of dollars, with the refund in one case amounting to about 75 millions of dollars. While some of these monies might have been refunded in any case if the Commission, upon the completion of the proceedings had found that only part of the increase should be allowed as lawful, recent experience indicates that it would be the smaller, not the larger, part which would have to be refunded.

<sup>28</sup> Most pipelines have many customers, and in most instances it would be impossible, as a practical matter, to obtain the consent of all of them to a company-wide increase.

<sup>29</sup> It is interesting to note that, despite the Fifth Amendment's prohibition against confiscatory rates, a pipeline company is not given the right to invoke a Section 5 (a) proceeding. Cf. *Hope Nat. Gas. Co. v. Federal Power Commission*, 196 F. 2d 803, 809 (C. A. 4).

an interim suspension and refund provision comparable to that in Section 4 (e). Consequently, unlike a proceeding under Section 4 (e), in which both pipeline and consumer interests are fully protected while the matter is pending before the Commission, the pipeline companies may be paid only the existing rates during the pendency of the Section 5 (a) proceedings, even though the Commission ultimately finds these rates to have been unreasonably low.

Since experience has shown that it may take up to several years to conclude a controverted rate proceeding—particularly now when the Commission is overburdened with administrative problems of bringing the independent producers into compliance with the Natural Gas Act—it is clear that it may be a long time before some companies could be permitted to charge rates reflecting their costs as of today.<sup>30</sup> In order to absorb the spread between costs and preexisting rates until a Section 5 (a) proceeding could be concluded, and to discharge their refund obligations as a result of the rejection of their Section 4 (d) filings, important segments of the industry would have to make substantial inroads into their capital;

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<sup>30</sup> In this period of rising prices, there is no possibility that rates fixed in a Section 5 (a) proceeding upon the basis of actual figures for a known test year could keep pace with increasing costs. The result of exclusive reliance on Section 5 (a) proceedings would therefore be to create almost irresistible pressure for Commission acceptance of estimated costs in place of actual test year costs, with the resulting risk of inflation of rates. On the other hand, by virtue of Section 4 (e)'s provisions for the prompt taking effect of increases subject to refund, at least a rough balance can be maintained currently between a company's costs and its rates, and computations can be held to actualities.

the result might be that some companies will have to reorganize and others might go bankrupt.

Moreover, since under the holding below rate changes may, as a practical matter, be obtained only prospectively at the conclusion of Section 5 (a) proceedings, without any interim rate protection, the pipelines generally will not be able to secure the financing needed to expand their facilities in order to meet the widespread demand for gas among existing and potential consumers. We are advised that, because of the decision below, one and probably more major financings of pipeline expansions to serve the growing public demand for gas, which were in process of negotiation, have already been suspended.

And since the natural gas industry is the sixth largest in the country, financial impairment or retrogression of a substantial part of it would adversely affect other segments of the national economy. Deprived of a fair return, which due to rising costs is dependent upon rate increases made effective under Sections 4 (d) and 4 (e), those companies' inability to attract capital to finance the cost of new construction would have resultant impact on the industries which supply steel pipes, compressors, and the other extensive facilities required for new or expanded services. The adverse effect on employment can be foreseen. So also, communities which are seeking natural gas for heating and industrial purposes would be injured by their inability to obtain it as a result of the abrupt halt to which many pipeline expansion programs would be brought.

**CONCLUSION**

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

**J. LEE RANKIN,**

*Solicitor General.*

**GEORGE COCHRAN DOUB,**  
*Assistant Attorney General.*

**PAUL A. SWEENEY,**

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**DECEMBER 1957.**

## APPENDIX A

United States Court of Appeals for the District  
of Columbia Circuit

No. 13666

**MEMPHIS LIGHT, GAS AND WATER DIVISION; CITY OF  
MEMPHIS, TENNESSEE; AND MISSISSIPPI VALLEY GAS  
COMPANY, PETITIONERS,**

**v.**

**FEDERAL POWER COMMISSION, RESPONDENT,  
UNITED GAS PIPE LINE COMPANY; TEXAS GAS TRANS-  
MISSION CORPORATION; and SOUTHERN NATURAL GAS  
COMPANY, INTERVENORS.**

**ON PETITION FOR REVIEW OF ORDERS OF THE  
FEDERAL POWER COMMISSION**

**Decided November 21, 1957**

*Mr. Reuben Goldberg* for all petitioners. *Mr. George E. Morrow*, a member of the bar of the Supreme Court of Tennessee, *pro hac vice*, by special leave of the Court, also argued for petitioners Memphis Light, Gas and Water Division and The City of Memphis, Tennessee.

*Mr. Robert M. Weston*, Attorney, Federal Power Commission, with whom *Messrs. Willard W. Gatchell*, General Counsel, Federal Power Commission, and *Howard E. Wahrenbrock*, Solicitor, Federal Power Commission, were on the brief, for respondent.

*Mr. Thomas Fletcher*, with whom *Mr. C. Huffman Lewis* was on the brief for intervenor, United Gas Pipe Line Company.

*Mr. Christopher T. Boland* with whom *Messrs. Richard J. Connor* and *Thomas F. Brosnan* were on the brief, for intervenor, Texas Gas Transmission Corporation.

*Mr. William S. Tarver* for intervenor, Southern Natural Gas Company.

Before BAZELON, WASHINGTON and BASTIAN, Circuit Judges

WASHINGTON, *Circuit Judge*:

This case concerns the interpretation to be given the Supreme Court's decision in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332 (1956). The chief question is whether the rule of that case applies where—as here—the controlling supply contracts pledge payment under designated rate schedules “or any effective superseding rate schedules.”

## I

Petitioners seek review of an order of the Federal Power Commission denying their motions to reject new rate schedules filed by the intervenor United Gas Pipe Line Company (United). United sought to increase the prices at which it was obligated by contract to sell gas to the intervenors Texas Gas Transmission Corporation (Texas Gas) and Southern Natural Gas Company (Southern Natural), and also to petitioner Mississippi Valley Gas Company (Mississippi). Also denied by the Commission were petitioners' motions to prohibit the new rates from becoming effective and to require appropriate refunds by United.

Intervenor United is a “natural-gas company” within the meaning of the Natural Gas Act, 52 Stat. 821, 15 U. S. C. § 717a (1952), whose sales are subject to the jurisdiction of the Federal Power Commission.

Petitioner Memphis Light, Gas and Water Division is a gas distribution agency of petitioner City of Memphis, Tennessee. The interests of the City of Memphis and of the Division are identical; hereafter both will be referred to jointly as "Memphis." Memphis obtains all of its gas supply from intervenor Texas Gas. The latter, a pipe line company, in turn obtains a substantial part of its supply from United. Petitioner Mississippi is a gas distribution system. It obtains some of its supply by purchase directly from United. It also is supplied by Texas Gas and by Southern Natural. Southern Natural, like Texas Gas, obtains a substantial part of its supply from United.

Thus, United has direct seller-buyer relationships with Mississippi, Texas Gas and Southern Natural. United has no such relationship with Memphis, which buys only from Texas Gas. Texas Gas, a customer of United, has seller-buyer relationships with both Memphis and Mississippi. Southern Natural, also a customer of United, has a seller-buyer relationship with Mississippi only. The supply arrangements between the parties are governed by long-term service agreements (contracts).

On September 30, 1955, the Commission accepted United's new schedules for filing under Section 4 (d) of the Natural Gas Act, 15 U. S. C. § 717c (d) (1952). The level of these new rates had not been agreed to by United's contract customers. Acting under Section 4 (e), the Federal Power Commission suspended the operation of the new schedule for non-industrial sales and ordered a hearing on the lawfulness of the new schedule. These hearings were held, with Memphis as an intervenor therein, but are not involved in the present review.

In February, 1956, while the Section 4 (e) hearings were in progress, the Supreme Court announced its

decision in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, *supra*, holding that a gas seller could not unilaterally increase its contract rates for gas. Petitioners thereupon filed with the Federal Power Commission motions to prohibit United's new rates from becoming effective on April 1, 1956,<sup>1</sup> to reject those increases, and to order appropriate refunds. Their position was that United's filing was a unilateral attempt to increase rates and that the Federal Power Commission had no jurisdiction to process such an application under Section 4 (e), as construed in *Mobile*. See also *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U. S. 348 (1956). The Commission heard argument and on October 2, 1956, denied the motions in an opinion and order. Rehearing was denied on November 23, 1956. Petitioners now seek review of those orders.

## II

At the outset the Federal Power Commission urges that the orders here under review are interlocutory and not presently subject to our scrutiny. Of the intervenors only United joins in this attack: it urges in addition that petitioners, as strangers to the contracts here involved, are not "aggrieved" under Section 19 (b) of the Act, 15 U. S. C. § 717r (b) (1952).

The aggrievement issue is readily answered insofar as petitioner Mississippi is concerned. Mississippi is a party to three of the contracts here involved as a direct customer of United. And United is, in the proceeding here under review, seeking to increase the cost of gas to its direct contract purchaser Missis-

<sup>1</sup> April 1, 1956, is five months after November 1, 1955. November 1, 1955, is thirty days after the new schedules were filed. See Natural Gas Act § 4 (d), (e), 15 U. S. C. 717c (d), (e) (1952),

issippi. As to Memphis the situation is somewhat different. Memphis is not a direct customer of United. Rather it purchases from Texas Gas. But the Federal Power Commission has already approved an agreement between Texas Gas and Memphis whereby Texas Gas' customers will reimburse it for any increase in gas cost as a result of the hearings now in progress. Docket No. G-2017, 14 F. P. C. — (1955); see F. P. C. orders at 20 Fed. Reg. 8088, 8977 (1955). Because of this F. P. C.-approved agreement, Memphis will feel the immediate impact of any increase awarded. This immediate impact is sufficient to give Memphis standing. See *City of Pittsburgh v. Federal Power Commission*, 99 U. S. App. D. C. 113, 237 F. 2d 741 (1956); *National Coal Ass'n v. Federal Power Commission*, 89 U. S. App. D. C. 135, 191 F. 2d 462 (1951). No further action of the Commission is necessary to make operative the increased cost to Memphis. Cf. *California Oregon Power Co. v. Federal Power Commission*, 99 U. S. App. D. C. 263, 239 F. 2d 426 (1956); *Cincinnati Gas & Electric Co. v. Federal Power Commission*, — U. S. App. D. C. —, 246 F. 2d 688 (1957).

United's and the Commission's contentions that the orders here under review are interlocutory and that therefore we have no jurisdiction are without merit. Suffice it to say that this case is presented to us in substantially the same posture in which the *Mobile* case was presented to the Third Circuit and to the Supreme Court. See *Mobile Gas Service Corp. v. Federal Power Commission*, 215 F. 2d 883, 885 (3d Cir. 1954), aff'd sub nom. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332 (1956); see also *Tyler Gas Co. v. Federal Power Commission*, — U. S. App. D. C. —, — F. 2d — (decided August 1, 1957).

## III

This case is, in every pertinent aspect save one, a close copy of *Mobile*. That single aspect is the presence in the contracts here involved of the following provision:<sup>2</sup>

All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule [here is inserted the appropriate rate schedule designation], *or any effective superseding rate schedules*, on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached thereto and filed with the Federal Power Commission which are by reference made a part hereof. [Emphasis added.]

In *Mobile*, the Court stated at the outset that—

The question presented in this case is whether under the Natural Gas Act, 52 Stat. 821, 15 U. S. C. § 717 *et seq.*, a regulated natural gas company furnishing gas to a distributing company under a long-term contract may, without the consent of the distributing company, change the rate specified in the contract simply by filing a new rate schedule with the Federal Power Commission. 350 U. S. at 333-34.

The Supreme Court answered in the negative. In the present case, the question is whether the contract clause quoted above provides the "consent" necessary to give the Federal Power Commission jurisdiction to review under Section 4 (e) of the Act United's new schedule filed under Section 4 (d).

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<sup>2</sup> There is some dispute among the parties as to whether three of the contracts contain the quoted contract provision. For present purposes we will accept the Commission's representation in its brief that all of the contracts contain the disputed clause or its equivalent.

The Commission found that the phrase "any effective superseding rate schedules" did provide the consent required by *Mobile* and

that it was the understanding and intent of the contracting parties [as expressed in the above-quoted contract clause] to grant United the power to make changes in rates pursuant to section 4 (d) of the Natural Gas Act, without waiver, however, of the right of the purchasers to oppose such changes in proceedings before the Commission for the purpose of testing the reasonableness and justness thereof. \* \* \*

United's proposal for increased rates in this proceeding does not constitute a prohibited unilateral change of a contract, for the contract language supplies the purchaser's assent to United's filing of a change in rates.

In effect, the Commission's position is that the contractual consent to the *act of filing* is sufficient for Section 4 (d). Correct though the Commission's statement of the parties' intent may be, it does not answer the question whether the Commission has jurisdiction to accept such a schedule for filing and to proceed under Section 4 (e) to review United's filing of a new rate, where the level of the new rate itself has not been previously agreed upon by the parties to the contract. We know as a fact that not only Mississippi but Texas Gas and Southern Natural as well have not consented to the amount of the new rate, since all three of them are now opposing United's increase before the Commission.

#### IV

The Supreme Court's opinion, in describing the relation of Sections 4 and 5, stated clearly that Section 4 (d) was merely a requirement that the Federal Power Commission and the public be formally notified of any change made in any contract for the sale of

gas by a natural gas company. 350 U. S. at 339. The notice contemplated by Section 4 (d) is notice of the fact that the contracting parties have reformed their contract: that the seller has offered, and the buyer has agreed to, a particular new price to be effective no less than thirty days after the Commission is notified of the change. 350 U. S. at 339-40. It is only at this point—*after* the parties have negotiated privately a new price term—that the Commission, under Section 4 (d) and (e), in any way becomes involved with the rate changing process. Nothing in Section 4 (e) gives the Commission authority to assist the parties in negotiating a new price term.

Under the rule in *Mobile*, for the Commission to review rates under the more expeditious procedure of Section 4 (e), the seller must bring to the Commission a negotiated agreement. And that agreement to the new rate must be as specific in its terms as was the previous contractual agreement to the rate schedule sought to be superseded. See 18 C. F. R. Pt. 154. If such a new rate schedule has been properly agreed upon and is filed pursuant to Section 4 (d), the Federal Power Commission may then under Section 4 (e) undertake to review the new rate by ordering a hearing on the "lawfulness" of the new rate filing; and the Commission may suspend temporarily the non-industrial part of the new rate. To the extent that the Federal Power Commission is convinced by the filing company that the new rate is neither unjust nor unreasonable, that new rate may be approved, or a lower rate may be approved, or the new rate may be found unlawful in its entirety and, if necessary, appropriate refunds may be ordered.

To quote *Mobile*:

The relationship of these sections [§§ 4, 5] thus affords no support to petitioners' charac-

terization of § 4 (d) and (e) as establishing a rate-changing "procedure"—a "proceeding" before the Commission "initiated" by a natural gas company filing a "proposed" change. Section 4 (d) provides not for the filing of "proposals" but for notice to the Commission of any "change \* \* \* made by" a natural gas company, and the change is effected, if at all, not by an order of the Commission but solely by virtue of the natural gas company's own action. If the purported change is one the natural gas company has the power to make, the "change" is completed upon compliance with the notice requirement and the new rate has the same force as any other rate—it can be set aside only upon being found unlawful by the Commission. It is thus no more a "proposed" rate than any other rate, all of which are equally subject to Commission review. Likewise, no "proceeding" is "initiated" by a § 4 (d) filing. A proceeding to review the new rate may be initiated under § 4 (e), but, if so, it is initiated by the Commission in the same manner as a proceeding under § 5 (a) to review any other rate, that is, upon complaint or its own motion." 330 U. S. at 342.

## V

For these reasons, we hold that since United had not obtained the consent of its contract customers to the rate itself—albeit some of those customers may have consented to the act of filing—the Federal Power Commission had no power to file the new rate schedules under Section 4 (d) and therefore could not review the new rate pursuant to Section 4 (e). It is not sufficient for a Section 4 (d) filing that United's customers have consented to allow United to have the

Commission invoke Section 4 (e) to review a rate increase during the contract term, where the parties have not agreed to the specific rate. Doubtless the contracting parties could have agreed on a third party to arbitrate a dispute when the seller sought to raise its price. But the Federal Power Commission has not been given that arbitration function by statute.

Again to quote *Mobile*:

These sections [§§ 4, 5] are simply parts of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful. The Act merely defines the review powers of the Commission and imposes such duties on natural gas companies as are necessary to effectuate those powers; it purports neither to grant nor to define the initial rate-setting powers of natural gas companies.

The powers of the Commission are defined by §§ 4 (e) and 5 (a). The basic power of the Commission is that given it by § 5 (a) to set aside and modify any rate or contract which it determines, after hearing, to be "unjust, unreasonable, unduly discriminatory, or preferential." This is neither a "rate-making" nor a "rate-changing" procedure. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them. Section 5 (a) would of its own force apply to *all* the rates of a natural gas company, whether long-established or newly changed, but in the latter case the power is further implemented by § 4 (e). All that § 4 (e) does, however, is to add to this basic power, in the case of a newly changed rate or contract (except "industrial" rates), the further powers (1) to preserve the status quo pending review

of the new rate by suspending its operation for a limited period; and (2) thereafter to make its order retroactive, by means of the refund procedure, to the date the change became effective. The scope and purpose of the Commission's review remain the same—to determine whether the rate fixed by the natural gas company is lawful. 350 U. S. at 341.

The contracting parties cannot, of course, vest the Federal Power Commission with power not given to that body by Congress.<sup>3</sup>

<sup>3</sup> Judge Bazelon and the present writer, speaking only for ourselves, wish to add that in our view acceptance of the position of the Commission and the intervenors in this case would be to give approval to a ready means of debilitating Section 5 (a). That section contemplates, *inter alia*, that a natural gas company, claiming that its rates are too low, may seek to have the Federal Power Commission hold a hearing to review its present rates. In that hearing, a record must be made on which the Commission can decide whether the present rates are "unjust, unreasonable, unduly discriminatory, or preferential." And if the rates, after hearing, are found to be too low the Commission may order the rates increased to a lawful level. Respondent and intervenors would have us hold that the natural gas company seeking an increase could avoid that statutory scheme by securing its customer's consent merely to the act of filing, and with such consent be entitled to Commission review under Section 4 (e). By using the Section 4 (e) procedures the company could get its rates into effect quickly and would avoid both the delay and the more stringent proof requirements of Section 5 (a). In the Section 4 (e) hearing, according to respondent and intervenors, the filing party would merely be required to show that the new rate—rate to which, by hypothesis, its customers had not consented—is one which is not unlawful, i. e., that it is a rate within a zone of reasonableness, *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246, 251 (1951); *Sierra Pacific Power Co. v. Federal Power Commission*, 26 U. S. App. D. C. 140, 142, 223 F. 2d 605, 607 (1955), without reference to the lawfulness or adequacy of the old rate. In Section 5 (a) hearing, however, a record would have to be

From this discussion it follows that we must reverse and remand this case to the Federal Power Commission for further proceedings not inconsistent with this opinion, and with directions to reject the schedules filed by United and to initiate such proceedings as may be necessary to secure refunds of the incremental amounts paid to United since the time that those schedules were erroneously allowed to become effective.

*So ordered.*

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### *Judgment*

This case came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the orders of the said Federal Power Commission on review herein be, and they are hereby, reversed, and that this case be, and it is hereby, remanded to the Federal Power Commission for further proceedings not inconsistent with the opinion of this Court, and with directions to reject the schedules filed by United Gas Pipe Line Company and to initiate such proceedings as may be necessary to secure refunds of the incremental amounts paid to United Gas Pipe Line Company since the time that those Schedules were erroneously allowed to become effective.

Dated: NOVEMBER 21, 1957.

PER CIRCUIT JUDGE WASHINGTON.

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made showing not only that the new rate was lawful, but that the old rate was "unjust, unreasonable, unduly discriminatory, or preferential." And under Section 5 (a) if the new, non-consented rate, or any part of it, were approved, it would not become effective until after the hearing was concluded and the increase ordered formally by the Commission. The company awarded the increase would, in addition, have to file under Section 4 (d) a new schedule reflecting the rate awarded.

## APPENDIX B

The Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U. S. C. 717, *et seq.*, provides, in pertinent part, as follows:

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate

to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect, and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for

the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified.

\* \* \*

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by

order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

• • • • •

SEC. 15. (a) Hearings under this act may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

• • • • •

SEC. 19. (b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such peti-

tion shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. \* \* \*

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JOHN T. FEY, Clerk

No. 99-25

In the Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL POWER COMMISSION, PETITIONER

v.

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED  
STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA  
CIRCUIT

REPLY MEMORANDUM FOR THE FEDERAL POWER  
COMMISSION

J. LEE BARKIN,

Solicitor General

Department of Justice, Washington 25, D. C.

WILLARD W. GATCHELL,

General Counsel,

Federal Power Commission,

Washington 25, D. C.

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# *In the Supreme Court of the United States*

OCTOBER TERM, 1957

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No. 694

FEDERAL POWER COMMISSION, PETITIONER

v.

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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REPLY MEMORANDUM FOR THE FEDERAL POWER COMMISSION

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## I

Despite what they say in their Brief in Opposition, respondents do not deny, and cannot deny, that:

(a) Service agreements of the type involved here are used extremely widely throughout the natural gas industry (see Pet. in No. 694, pp. 7, 26); that this form of service agreement was widely adopted in accordance with, and pursuant to, the 1948 Commission order establishing the tariff-and-service-agreement form (see Pet. in No. 694, pp. 4-7, 26-27); that the understanding of the Commission, and by far the largest portion of the natural gas industry, as to the

effect and operation of this form of service-agreement is and has been as stated in the petitions for certiorari in Nos. 691, 694 and 695, directly contrary to the view expressed by the respondents (as set forth in Br. in Opp., Part II, pp. 12-18)<sup>1</sup>; and that acceptance of respondents' interpretation of those agreements (which the Court of Appeals did not adopt, see Pet. in No. 694, pp. 37, 39-40) would cause a wholesale attempt at revision and change of these widely used service agreements, with all the resultant confusion and uncertainty.

(b) Regardless of the intent and meaning of the *present* form of service agreements, the legal ruling of the Court of Appeals in this case—that, where there is an agreement with an initial rate, no increased-rate filing can be accepted under Section 4 of the Natural Gas Act unless the purchaser consents to the actual amount of the increase—would preclude any change to clarify or make more explicit the intent of the present service agreements to permit filings of such increased rates without the purchaser's consent to the increase; the decision of the Court of Appeals goes beyond the present form of agreement and prohibits all comparable forms, such as those suggested by respondents in Part II of the Brief in Opposition.

(c) Whether or not respondents agree with petitioners (i) as to the precise extent of the uneasiness, un-

<sup>1</sup> In addition to the petitions for certiorari in Nos. 691, 694, 695, see the various motions for leave to file briefs *amici*. See also Opinion No. 308 of the Federal Power Commission, dated January 24, 1958, reprinted in the Appendix, *infra*, pp. 4a ff.

certainty, confusion, and probable loss caused by the decision below, and (ii) as to the possibilities of "living with" that decision if it should be upheld—it must be conceded that the decision has had a very large impact, that the question presented by the petitioners is a most important one in the administration of the Natural Gas Act which governs a significant industry and widely affects the public, and that the case falls squarely within the bounds this Court has established for the exercise of its certiorari jurisdiction.

## II

We now discuss some of the individual contentions made by respondents in their Brief in Opposition.

1. Respondents argue that the Commission's position here represents an attempt to "secure a belated rehearing of the *Mobile* decision or to restrict it unduly to its precise facts" (Br. 8-9).<sup>2</sup> We have shown, however, in our petition (Pet. in No. 694, pp. 12-18), and will show in greater detail in our main brief should the writ be granted, that the result reached by the court below is basically inconsistent with *Mobile* (which, in fact, affirmatively supports the Commis-

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<sup>2</sup> Since this Court's decisions in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332, and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U. S. 348, the Commission has uniformly honored pre-existing price contracts, it has accepted no rate filings under Section 4 (d) of the Act which violated such contracts, and has applied the standard of the public interest in reviewing existing price contracts under Section 5 (a). See Appendix *infra*, p. 9a.

sion's position), and unduly narrows the ability of gas companies to file new rates with regard to their sales.<sup>3</sup>

2. Respondents urge (Br. 12-18) as an alternative ground supporting the lower court's decision that, even if the parties to a gas sale can lawfully agree that the seller will set rates which are legal and payable until set aside by the Commission, no such agreements were made in this particular case. However, the Commission found that the parties had so agreed, and the court below accepted this finding for the purposes of its decision.<sup>4</sup> Furthermore, the meaning of the particular service agreements here, turning perhaps on particular wording, is of limited impor-

<sup>3</sup> Respondents argue (Br. 16-17) that it is inequitable to allow pipe lines to set their rates *ex parte*, even with their customers' consent, since rates for industrial resale cannot be suspended by the Commission. Of the eighty largest natural gas companies, only seven make non-suspendible sales for industrial resale, and such sales averaged only 6.1% of the total dollar volume of their jurisdictional business during the calendar year 1956, or fiscal years ending in 1956 and 1957. United Gas Pipe Line Company's non-suspendible jurisdictional sales during calendar 1956 averaged 2.92% of its total jurisdictional business. Procedures governing the great majority of gas sales should not be invalidated because of this anomaly. The Commission has repeatedly recognized the inequity of the prohibition against suspension of rates for industrial resales and has recommended that it be removed from the Act in each of its annual reports to Congress since 1951, and for some years prior thereto in its justification for appropriations. *Annual Reports of the Federal Power Commission, for 1951, 1952, 1953, 1954, 1955 and 1956*, at pp. 144, 152, 154, 170, 181, and 18, respectively.

<sup>4</sup> The Commission required deletion of the language appearing in United's original tariff, to which respondents refer (Br. 14-15), because the language had been included in the general terms and conditions of the tariff where it would have had the

tance in view of the variety in language currently in use in gas service agreements (see, *e. g.*, the provision quoted at page 26, fn. 24, of our petition). It follows that, as we have already noted, the correctness *vel non* of the contract interpretation urged by respondents in this particular case<sup>1</sup> (Br. 12-18) has little or no bearing on whether the petitions should be granted, since the most important issue, the only issue decided by the lower court, is whether the Natural Gas Act permits rate changes pursuant to contractual arrangements such as those which the Commission not only found to exist here, but which unquestionably do exist in most gas service agreements.

3. Respondents (Br. 18-29) also attempt to minimize the importance of the issue by citing isolated instances of negotiations between pipelines and their purchasers leading to rate settlements. Rate settlements have always played an important part in setting gas rates, and the Texas Gas negotiations to which respondents refer were in fact in an advanced stage prior to the decision below.<sup>5</sup> However, a substantial

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effect of modifying existing contracts contrary to the express intent of Order No. 144. It was also objectionable in stating that United reserved a "right to revise its rates" contrary to Section 4 of the Act, rather than merely reserving a right to file rate changes subject to Commission review.

<sup>5</sup> The Colorado Interstate settlement negotiations referred to by respondents (Br. 21) are only now being initiated, without any assurance of success.

The fact that Transcontinental Gas Pipe Line Corporation deemed it desirable to send a letter on this case to its stockholders emphasizes the importance which the Company attributes to the decision.

percentage of rate-increase cases have always been resolved by the Commission after contested hearings. Settlements can be relied upon in setting gas rates only if all parties are willing voluntarily to allow the seller its legitimate costs plus a reasonable return, and it is unrealistic to anticipate cooperation in the absence of strong economic incentives on the part of all parties. Moreover, pipeline expansion is usually financed by long-term loans, and financial institutions cannot be expected to make necessary loans of the magnitude required if the pipeline must rely upon continued purchaser cooperation to assure increases in revenue as needed. There is similarly no basis for assuming that gas purchasers, such as the present respondents, will in every case cooperate in expediting Section 5 (a) proceedings when it is not in their interest to do so.\*

Respondents also assert (Br. 27) that unilateral filing procedures destroy the incentive of pipelines to bargain for lower rates by allowing them immediately to pass on rate increases. Any pipeline

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\* Respondents imply (Br. 28, fn. 27) that the Commission's 1953 Annual Report expressed a preference for Section 5 (a) proceedings in place of Section 4 review proceedings, characterizing the latter as "unsatisfactory", etc. Respondents fail to point out, however, that the report expressed no preference for Section 5 (a) or disapproval of Section 4, as such, but rather requested additional staff and facilities to handle a greatly increased volume of rate filings. Had these filings been reviewable only under Section 5 (a), in the sense held by the court below, the burden on the Commission staff and its budgetary requests would have been greatly increased, and the Commission would have regarded the situation as even more unsatisfactory.

increase is, of course, subject to Commission review and disallowance; also, a pipeline's rates must increase if its gas costs increase, other things being equal, and the Commission is charged with regulating producer rates under this Court's decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U. S. 672. Requiring pipelines to attempt to negotiate specific price contracts with their buyers, which are similarly placed with regard to cost-based increases, realistically can do little to affect this situation. On the other hand, restricting pipelines to rate increases under Section 5 (a) creates a serious obstacle to their purchasing additional gas supplies, under present market conditions, and in contracting for new construction, since unit costs have almost invariably been higher than similar costs in earlier periods. Rates fixed upon such lower costs obviously would not be compensatory for the higher investment subsequently made, a factor discouraging pipe line expansion demanded by growing consumer needs.

4. Respondents also refer repeatedly (Br. 19-20, 22, 25) to a speech made by the Chairman of the Federal Power Commission before the New York Society of Security Analysts on January 3, 1958, which they claim conflicts with assertions made by petitioners. Respondents point to the Chairman's speech as evidence that the Commission no longer believes that the decision below will have a substantial adverse effect on natural gas consumers, and argue that it demonstrates the unimportance of the issue which the Commission urges this Court to review. The speech which represented the Chair-

man's own views, not necessarily those of the Commission as a whole, is not susceptible, however, of this construction.

Aware that the decision of the court below was having a serious adverse effect upon the pipeline industry and that it placed in jeopardy the plans of a number of pipelines to expand their service to the ultimate consumer,<sup>7</sup> the Chairman's speech represented an effort to place the problems raised by the decision in perspective by emphasizing the inherent strength of the natural gas industry and its importance to the national economy. Its purpose was to attempt to allay apprehensions which were sweeping the security market.

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<sup>7</sup> The decision below had had an immediate impact on the financing plans of several pipelines which was reflected in the security market. On December 4, 1957, a large pipeline announced the postponement of a proposed sale of \$40,000,000 in first-mortgage bonds, in order to evaluate the possible effect of the decision on the company. Subsequently, on December 19, 1957, three pipelines announced decisions to postpone construction programs totaling expenditures of \$182,000,000 because of the decision. During this period, numerous market reports by reputable security analysts or investment banking concerns came to the attention of the Commission which uniformly recommended that their customers defer purchases of pipeline stocks pending examination of the decision, and that investors give serious consideration to disposing of pipeline securities. Additionally, Standard and Poor, in its market letter circulated on December 16, 1957, had advised its clients that it had removed the stock of a major gas pipeline from its recommended list. This letter, which was given wide distribution, and is typical of the advice given to investors by most analysts at this time, stated that "without clarification, the natural gas business will be in a chaotic state" and "the adverse ruling by the Court of Appeals throws a pall over the natural gas pipeline industry".

The Chairman expressed his view that the industry generally would not "necessarily" be bankrupted as a result of the decision, pointing to "hopes" that settlements of outstanding liabilities would be possible and that the possible refunds in some cases would be offset by duplicating refunds or tax adjustments. He also added that the Commission "may" be able to revise its procedures under Section 5 (a) to permit expedition of rate-increase approvals, a possibility specifically taken account of in the Commission's petition in No. 694 (p. 29, especially footnote 30), which would not necessarily redound to the "consumers' benefit.

The Chairman's statements perhaps differ in emphasis but do not conflict with the views already expressed in the petition by the Commission; if anything, they underline the importance and need for resolution by this Court of the issue decided by the court below.

The Commission has since formally stated its view of the importance of the issue here involved, in the *Matter of El Paso Natural Gas Company*, Opinion No. 308, Docket No. G-12948, issued January 24, 1958 (reproduced in the Appendix, *infra*, pp. 1a-17a) to which this Court is respectfully referred. This Opinion represents the official view of the Commission on this matter.

**CONCLUSION**

For these reasons, and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

**J. LEE RANKIN,**  
*Solicitor General.*

**WILLARD W. GATCHELL,**  
*General Counsel,*  
*Federal Power Commission.*  
**JANUARY 1958**

# APPENDIX

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connoles, and Arthur Kline

Docket No. G-12948

In the Matter of  
EL PASO NATURAL GAS COMPANY

Opinion No. 308

OPINION AND ORDER DENYING MOTIONS TO DISMISS

(Issued January 24, 1958)

This is a proceeding instituted by the Commission to determine the lawfulness of rate increases filed by El Paso Natural Gas Company (El Paso). Motions which, in general, suggest that this proceeding should be dismissed on the basis of the legal principles laid down in *Memphis Light, Gas and Water Division, et al. v. Federal Power Commission* (CADC, Case No. 13666, decided November 21, 1957) have been filed by California authorities and El Paso customers as follows:

Moving Party	Date of Filing
Pacific Gas and Electric Company	December 9, 1957
Southern California Gas Company and Southern Counties Gas Company of California	December 9, 1957
San Diego Gas & Electric Company	December 10, 1957
People of the State of California and The Public Utilities Commission of Said State	December 16, 1957
Nevada Natural Gas Pipe Line Company	December 18, 1957
Northwest Gas Corporation	January 9, 1958

On December 23, 1957, El Paso filed an opposition to such motions, with attached affidavit, memorandum of points and authorities, and exhibits; and El Paso subsequently incorporated by reference such opposition in its answer to the later-filed motion of Southwest Gas Corporation.

The Commission has received requests from El Paso, and from Southern California Gas Company and Southern Counties Gas Company of California to expedite decision of these motions. It appears in this connection that the right of the California distribution company customers of El Paso to effect increases in their local rates concomitantly with (and offsetting) El Paso's rate increases to them may depend on our prompt decision of the motions, particularly by reason of the California Public Utilities Commission Decision 55902 of December 5, 1957, and Decisions 55998, 55999, 56000 and 56001 of December 17, 1957.<sup>1</sup>

In addition, on January 6, 1958, the Commission received a request of the State of New Mexico, by its Attorney General, and of the New Mexico Public Service Commission, by its Chairman, stating the existence of interests substantially and directly affected by the decision of the pending motions, and

<sup>1</sup> By decision 55902, the California companies were ordered to "refrain from consenting, or manifesting any consent whatever to El Paso's rate increase proposals; "prosecute diligently, vigorously and in good faith before the Federal Power Commission and the courts whatever legal rights they may have derived from the Memphis ruling; and to report action to the California P. U. C. By the other decisions, four California companies were permitted to file rate increases to their consumers offsetting lawful rate increases effected by El Paso. Accordingly, the views hereinafter expressed as to the lawfulness of El Paso's new rates are of immediate importance to customers and consumers in California.

asking that the Commission take prompt action denying the motions.<sup>2</sup>

Because of the exceptional circumstances existing in respect to the instant motions, the apparent desirability of an expression by the Commission as to the legality of El Paso's currently effective rates to its California customers, and the desirability generally of clarification of the situation in which other pipeline companies also find themselves by reason of rate increase filings which have not been specifically agreed to by their customers, we conclude that the public interest requires prompt decision in the present case, rather than deferral of action on the motions to dismiss.

*Present Status of this Proceeding.* On June 28, 1957, El Paso tendered for filing certain revisions to its FPC Gas Tariff, Original Volume No. 1, and proposed that such revisions be effective August 1, 1957. These revisions, in the form of revised tariff sheets (see F. P. C. Regulations Under the Natural Gas Act, Sec. 154.33 (d) (2) (i)), contemplate an annual increase in El Paso's rates for jurisdictional sales amounting to nearly \$16.7 million per annum, constituting an increase of about 10.5% over El Paso's pre-existing rates.

On July 26, 1957, the Commission, citing Sections 4 and 15 of the Natural Gas Act, ordered a hearing on the issue of "the lawfulness of the rates, charges, classification, and services, contained in El Paso's FPC Gas Tariff Original Volume No. 1, as proposed to be changed by the aforesaid revised sheets tendered for filing on June 28, 1957." The Commission, un-

<sup>2</sup> Petitions for certiorari of the *Memphis* decision have been filed in the Supreme Court by the Solicitor General on behalf of the Commission, and by United Gas Pipe Line Company, Texas Gas Transmission Company and Southern Natural Gas Company.

der the authority of Section 4 (e) of the Act, also suspended the effectiveness of El Paso's rate revisions<sup>3</sup> until January 1, 1958, or such later time as such revisions might be made effective under conditions prescribed in the Act.

On November 22, 1957, El Paso moved that the suspended revised tariff sheets be made effective as of January 1, 1958. By order of December 31, 1957, the Commission accepted this motion, conditioned on the filing by El Paso of a surety bond, or equivalent assurance, covering El Paso's potential liability to refund up to 100% of all the increase so made effective in the event or to the extent that such increases are held by the Commission to be unlawful. The order of December 31, 1957 reserved the general issue raised by the motions now under consideration.

*Analysis of El Paso's "Tariff" Rates.* The foregoing indicates, and we find, that El Paso's rates and charges are set by its effective tariffs on file with the Commission, and not by price-fixing contracts between El Paso and its customers. Indeed, the fact that El Paso's rates are fixed by tariffs rather than contracts is spelled out in detail in "service agreements"<sup>4</sup> existing between El Paso and each of the moving party customers listed above.<sup>5</sup> It follows almost by defini-

<sup>3</sup> Except for two revised tariff sheets covering gas resold by the customer for industrial use only, which are not subject to suspension under a specific exception contained in Section 4 (e) of the Act.

<sup>4</sup> Service Agreements, which form a part of the tariff separate from the rate schedules, cover matters such as area to be served, maximum obligation to deliver, delivery points, delivery pressure, and the like. Regulations Under the Natural Gas Act, Sections 154.34, 154.38, 154.40.

<sup>5</sup> These service agreements, set out in the moving papers and on file with the Commission, provide as follows: "Buyer shall pay Seller for natural gas purchased and for services ren-

tion, and certainly by the expressed intention of El Paso and its customers, that the rates established by El Paso's tariffs are subject to change by El Paso's *ex parte* tariff filings as permitted by Section 4 (e) of the Act to become effective. This does not mean that El Paso will reap financial benefit from any rate increase which it chooses to so file. For under the rate-making process set forth in Section 4 (d) and (e) of the Act, any such filings made effective prior to hearing may be subject to refund in whole or part, with interest, insofar as subsequently disallowed by the Commission. And El Paso's currently "effective" tariffs include a rate increase subject to refund which awaits a presiding examiner's decision in Docket No. G-4769, as well as the rate increase involved in the present proceeding, which as already stated, became effective January 1, 1958, subject to the refund conditions mentioned above.

For a proper understanding of the impact of the Memphis decision on the conventional rate-making dered hereunder in accordance with seller's Rate Schedules [here is inserted the designation of the particular schedules applicable to the particular customer] on file with and subject to the jurisdiction of the Federal Power Commission and lawfully in effect from time to time. The rates contained in such Rate Schedules on file with said Commission and in effect at the time of commencement of service hereunder shall be the initial rates to be paid by Buyer to Seller under this Agreement and shall continue until the same are changed in accordance with lawful requirements. It is agreed that Seller shall have the right to make and file with the Federal Power Commission in accordance with Section 4 of the Natural Gas Act, changes in these rates and new rates or rate schedules; provided, however, Buyer shall have the right to protest any such changes in rates and new rates or rate schedules before said Commission, and to exercise any other rights it may have with respect thereto under the Natural Gas Act, as amended, or as it may be amended, including Section 5 of such Act.

and rate-changing process, we believe it important to trace the evolution of El Paso's present gas supply arrangements with its customers, which contemplate the sale of gas pursuant to uniform tariffs changeable at will by El Paso, but subject to the Commission's power to revise or annul any such changes *ab initio*.

Prior to 1949, El Paso, in common with many other natural gas companies, fixed its rates by individual agreement with each customer, and filed such rate agreements with the Commission as "schedules" under Section 4 of the Act. This procedure was changed to comply with Order No. 144, 13 Fed. Reg. 6371, adopted October 28, 1948, by the Commission:

This order required all pipeline companies to restate their rate agreements in the form of gas tariffs. The form and content of such gas tariffs were prescribed in new Part 154, entitled "Rate Schedules and Tariffs," added to the Commission's Regulations Under the Natural Gas Act.

On August 31, 1949, pursuant to Order No. 144, El Paso filed its FPC Gas Tariff, Original Volume No. 1, effective October 1, 1949. As contemplated by the Regulations, the structure of such tariff was and is: (a) rate schedules for all classes of service; (b) general terms and conditions, which make uniform for all services rendered by the natural gas company such provisions as the definition of terms, the quality and measurement of the gas to be delivered, billing, payments, and delivery pressures; and (c) form service agreements. See *United Gas Pipe Line Co.*, 16 F. P. C. 10 Op. No. 294, issued October 2, 1956, 15 P. U. R. 3d 216, 218.

Order No. 144 did not purport to divest rights to gas rates fixed by firm contract between any pipe-

line and its customers. Such rates could under the order have been restated in form, without affecting the substance of the contract. Regulations, Section 154.84; *United Gas Pipe Line Co. v. F. P. C.*, 181 F. 2d 796, certiorari denied, 340 U. S. 827.

In the case of El Paso, however, no contention is or could be made that any customer presently is entitled to receive gas at prices fixed by a pre-1949 contract. In respect of pricing provisions, all prior contracts have been terminated on consent, and superseded by uniform tariffs as described above, as a result of settlements and new service agreements based on the proceedings in *El Paso Natural Gas Co.*, 10 F. P. C. 1484, Docket Nos. G-1380 and G-1696, order issued November 1, 1951, and in *El Paso Natural Gas Co.*, 16 F. P. C. 764, Docket No. G-2018, order issued July 20, 1956. Neither is any contention possible, under El Paso's uniform service agreements with its customers, that at any time material to this proceeding El Paso is bound by the terms of a price-fixing contract to gas rates other than the rates which may from time to time be "effective" on the basis of El Paso's filings accepted by the Commission, or as changed and fixed by the Commission in accordance with the Natural Gas Act.

We conclude that El Paso's legal rates at present are those set forth in its gas tariffs filed with this Commission. If such rates are changed as a result of determinations made in Docket No. G-4769 or in the present proceeding, the lawful rates so determined will become the "effective" rates in substitution *ab initio* for any higher rates collected in the interim, and refunds will be made accordingly. (See *Hope Natural Gas Co. v. F. P. C.*, 196 F. 2d

803 (C. A. 4), *reh. den.* and opinion clarified 197 F. 2d 522).

The *Memphis* decision by the Court of Appeals raises questions as to the propriety of continued recognition of tariff rates and rate schedule changes in accordance with the procedure followed in the present case. It is, therefore, appropriate for us to amplify our views as to the public policy and the other considerations involved in doing so pending final determination of the *Memphis* case.

At this time only a few companies seem to be in immediate financial difficulties and they are endeavoring to work out of their troubles on a temporary basis while they search for more effective permanent solutions or a court decision is reached. While the Commission, as a regulatory agency, must and does give full effect to the decisions of courts, it is not convinced that the reasoning of the Court of Appeals in the *Memphis* case represents the intention of Congress as expressed in the Natural Gas Act or that it would be in the public interest for the Commission to follow that decision until the final word has been spoken. It has, therefore, requested the Solicitor General to file a petition for *certiorari* in the Supreme Court, which he has done, seeking the final judgment of the highest court on this fundamental question of rate changes under the Natural Gas Act. In the interim, we must deal with grave economic conditions, some of which we shall mention below.

*Public interest in Tariff form Rate Schedules.* The reasons which led the Commission to adopt Order No. 144 and require pipelines to use rate schedules in tariff form rather than the private contracts previously in vogue are even more valid today than they were in 1948 when that order was adopted. The use of rate schedules conforms to historically effective

practices, agrees with pricing methods followed by regulated industries generally and is consistent with organic regulatory statutes on a Federal and State level. Moreover, it follows the practice under the Interstate Commerce Act, from which the rate provisions of the Natural Gas Act were taken. It affords better protection to consumers in both old and new service than can be achieved if hundreds of separate customer contracts are used as a substitute and it substantially reduces the administrative burden. The use of tariff forms is a necessity to avoid successfully the risk of unjust discrimination, preference or prejudice outlawed by the Acts we administer.

Experience has shown that in practical operation, the paramount interest of consumers in low reasonable rates for natural gas has been promoted by (a) generally applicable pipeline tariffs and (b) Commission review of rate changes pursuant to the Section 4 (e) process, during the current era of rising prices and rising cost-of-service. Except in two instances, the Commission has set pipeline rates, *either* under Section 4 (e) or Section 5 (a), of the Act, on the *single* standard of cost-of-service (including reasonable return).<sup>\*</sup> Differences in terminology between the two sections are not of practical importance in this connection, since the net result of any proceeding is a single cost-of-service determination, reflecting a process of simple addition of the specific items of cost as followed by the Commission.

<sup>\*</sup> Since the Supreme Court's decisions in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332 and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U. S. 348, the Commission has uniformly honored pre-existing price contracts, it has accepted no rate filings under Section 4 (d) of the Act which violated such contracts, and has applied the standard of the public interest in reviewing existing price contracts under Section 5 (a).

With tariffs, the general and specific responsibilities of the Commission in reviewing rates are greatly simplified. Industry-wide, we find that about one hundred tariffs efficiently replace many thousands of separate gas contracts. In any given case of rate review, the provisions of one tariff rather than many contracts are the basis for determination of just, reasonable and non-discriminatory rates. Consequently, we would fully expect administrative costs to increase materially if tariff schedules must be established only by the Commission under Section 5 (a) and that the administrative delays, especially in the adjustment period, will be material. These difficulties would in large part cast further burdens upon the consumers and be of no advantage except to those pipelines fortunate enough to secure customer assent to rates which were placed in effect and later found by the Commission in a Section 5 (a) proceeding to be excessive, for the Commission could not then require a refund.

In certificating the service of distribution areas requiring specified quantities of natural gas for residential and other use, the Commission, in the protection of consumer and investor interests, insists upon evidence that the applicant pipeline will have an adequate gas supply for a long enough period of time to return some of the distribution property costs—usually 20 years or more. Gas supply contracts with distribution customers entered into by pipelines, therefore, must be and are long-term as to quantities and service conditions, but not as to price.

Under present standard practice, these schedules have established an initial price, leaving future prices to be fixed by the future "effective" tariffs of the pipeline as its costs may change. Under the Memphis rule, and absent customer agreement to each specific

rate increase at the time it is proposed, pipelines might be under the compulsion of trying to fix at the outset firm future prices for the entire term of each contract.

Under current market conditions, with competition among pipeline customers for additional gas, we believe that prices arrived at by contract will tend to be higher than prices finally becoming effective under the present practice (usually by settlement arrived at under Commission supervision but always subject to Commission approval).

There are already indirect effects flowing from the present uncertainties which are of importance. A number of distribution companies have reported immediate uncertainties in their plans for expansion of natural gas service because their pipeline suppliers are uncertain as to their plans. Orders for new pipe, compressors, and other equipment and security issues have been cancelled or postponed. The postponement of expansion plans may not be of serious import to many pipelines, but it is of grave concern to those areas where distribution companies have been and are making investments to render service which cannot be given without additional gas supplies and to pipeline equipment suppliers.

Much of the Commission's time spent on certificate applications is devoted to the demands of communities for additional gas service as presented in Section 7 (a) applications and it has frequently been difficult to allocate limited supplies among those distribution companies demanding service. Hence a disturbance of this magnitude finds its heaviest impact in the consuming areas.

Some pipelines are experimentally resorting to the device of trying to secure customer assent to the filing with the Commission of specified increases at stated

intervals reserving to their customers the full right to subsequently contest any requested increase in the specified amounts in the usual manner. However, they report that they are unable to utilize this device for more than a few years because the customers are reluctant to commit themselves for more than two or three years and they are not sure they can secure the assent of all of their customers even for that short a period. If by this device, they are able to meet the contract agreement of the *Memphis* rule, these pipelines, upon the expiration of the experimental agreements, will be face to face with the problem of how to obtain adequate revenues to meet rising costs.

When rates are established by private contract, the possibility of undue discrimination against or preference for individual customers is ever present. The bargaining position of each pipeline customer is—theoretically in all cases, and actually in many cases—different from that of other customers. Rates under private contracts may therefore, if for no other reason, tend to reflect the conditions of the particular bargaining process rather than the public interest in uniformity. With ratemaking by tariffs, this tendency is counteracted, through the statement in such tariffs of the general kinds and classifications of service offered (see Regulations Sec. 154.38 (c)) to which all who qualify are eligible. With rate-making by

<sup>1</sup> For instance, the Commission in *United Gas Pipe Line Co.*, 12 F. P. C. —, Docket No. G-1158, Opinion No. 252, June 1, 1953, found that rates to Willmut Gas and Oil Company by contract of August 20, 1943, were unduly discriminatory and ordered United to supply Willmut at the rates of Willmut's neighbor, Mississippi Valley Gas Company. The Commission, however, has no power to order reparations and its order operated only prospectively, after the date of determination of the Section 5 (a) proceeding.

tariffs, changes in rate levels whether by way of increase or decrease, necessary to reflect cost-of-service prevailing for the time being, may with comparative simplicity be spread equitably among the scores or hundreds of customers and localities supplied by any given pipeline.

The Commission views with concern the administrative problem that it would face in continuously supervising the rates of the already vastly expanded and complicated pipeline industry of today and of the future, if contract rates are required to be substituted for uniform tariffs under the *Memphis* ruling. Even as of 1948, when the facilities and operations of this industry were far more restricted than they are now, it was clear that the public interest, including simplification of the administrative process, required that rates in contract form be restated as tariffs, as found in Order No. 144, *supra*. The same interest is doubly clear now that the industry has undergone and continues to undergo very considerable expansion.

We are aware that the Commission could, by instituting a Section 5 (a) proceeding, bring before it for examination all of the separate contracts of a pipeline company and if it found them to be discriminatory, preferential, unjust, or unreasonable for reasons which it would have to state with some particularity), it could prescribe tariff form rates for that company. Thereafter, of course, the pipeline could file rate changes under Section 4 (d) without the consent of its customers and could follow the rate procedures authorized in Sections 4 (d) and (e), subject, of course, to the Commission's examination, suspension and setting aside of any changes which in the Commission's opinion should

be further examined or set aside. Inevitably this will cause additional work and delay.

At present, the Commission has pending before it 53 rate increase cases, instituted by 34 pipeline companies, involving gross proposed increases amounting to about \$226 million per annum. These cases have been pending for varying lengths of time, the earliest having been started more than four years ago. Where the increases have been placed in effect subject to refund, the pipeline companies have collected about \$216 million of proposed rate increases which would have to be returned if customer assent should not be given.

On a monthly basis, the refund liability of these pipeline companies is accumulating at the rate of about \$15 million on an average, excluding interest. In addition, proposed rate increases still within the 5-month period of suspension prescribed in Section 4 (e) of the Act amount to over \$38 million per annum, and if such increases are put into effect pursuant to Section 4 (e) (as El Paso has done in the present proceeding), the total incremental charges being collected subject to refund will amount to over \$18 million per month on an average, excluding interest.

The effect of the *Memphis* decision on current operations of pipeline companies, faced with the possible liability to refund in cash all of these collections *pendente lite* would of course be very serious. The actual effect would, of course, be in direct proportion to the individual refund as related to the revenues of the given company. The annual gross income of the 34 companies presently collecting or proposing increases was reported for 1956 as \$1.3 billion, so that the refunds of the group could be a sixth or more of their gross revenues for a single

year.<sup>4</sup> Any refund of these proportions would have a severe impact upon the individual companies and indeed upon the whole industry. Some of the pipelines, of course, would have to make much larger refunds than others, for their increases have been in effect for a longer period.

We do not imply that none of the pipeline companies will be able to secure customer agreement to rate increases, for this obviously will not be the situation. Customers have agreed in the past, they have agreed since the *Memphis* decision was handed down on November 21, 1957 and it is to be expected that other pipelines and their customers will compromise their differences. Nevertheless, there is almost no economic incentive for a customer to agree to pay higher rates if it is satisfied with its service and does not need additional supplies or expanded service. On the other hand, if the requirements of a customer are expanding, it must ask the pipeline to meet those needs and, therefore, it could be forced to agree to a rate increase, although this situation does not prevail among all customers of all pipelines by any means.

Past experience has shown that in many instances when a pipeline company desires to expand its facilities in order to furnish additional supplies to areas which it is presently serving or to reach new distribution areas, it must increase its rates somewhat to meet increased construction and operation costs or to pay new higher prices to producers. Not only are construction costs higher year by year, but the sales

<sup>4</sup> These refund figures are not final since duplications are present and if refunds are made there would also be an adjustment of income taxes through which some of the loss would be recouped.

of new gas supplies by producers have invariably been at higher rates as new supplies are brought on the market. Under the present Section 4 (d) and (e) procedures for rate changes both the pipelines and the consumers are protected when a company is thus expanding. The pipelines have heretofore invested in new facilities, incurred additional costs, and filed rate increases which they regarded as necessary with the assurance that they could be placed in effect at the time required even if the ultimate decision of the Commission, after suspension, was delayed for many months. This has afforded to the Commission the time necessary for critical and objective analysis of the complicated situations presented, and has given to the consumers the assurance that they would not be called upon to pay rates which were found to be unreasonable, as well as facilities financing.

Under the Section 5 (a) process which seems contemplated for widespread application by *Memphis*, the present efficient coordination of expansion and reasonable rates on a current basis is not possible. Pipelines cannot obtain the necessary capital when investors are not confident that a sufficient return will be earned to meet increased costs that have been incurred. With the enormous growth of new residential areas and the ever growing demands in consumer areas for additional gas supplies, the Commission is constantly importuned by distribution companies and consumer interests to certificate the expansion of pipeline facilities.

*Conclusion.* In view of the grave implications of the *Memphis* decision on the rate-making process, by way of uniform tariffs, fostered by the Commission and now universally practiced by pipeline companies with regard to consumer interests, and the discharge by the Commission of its statutory responsibilities, as

well as the other matters to which we have referred, we believe that we must for the present continue to accept for filing rate schedules and rate schedule changes in tariff form, and continue to process them within the terms of Section 4 (c), (d) and (e) of the Act, as in the past, except as we may adapt our bond requirements to the uncertainties of the present situation.

Accordingly, *the Commission orders:*

The motions to dismiss listed and described above are hereby denied.

By the Commission.

J. H. Gutride,  
JOSEPH H. GUTRIDE,  
*Secretary.*

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1958

No. ~~25~~ 25

FEDERAL POWER COMMISSION,  
v. *Petitioner,*

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.

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**MOTION OF NATURAL GAS PIPELINE COMPANY OF AMERICA, CITIES SERVICE GAS COMPANY, COLORADO INTERSTATE GAS COMPANY, EL PASO NATURAL GAS COMPANY, KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., PACIFIC NORTHWEST PIPELINE CORPORATION, PANHANDLE EASTERN PIPE LINE COMPANY, TENNESSEE GAS TRANSMISSION COMPANY, TEXAS ILLINOIS NATURAL GAS PIPELINE COMPANY AND TRANSCONTINENTAL GAS PIPE LINE CORPORATION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1957

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No.

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FEDERAL POWER COMMISSION,  
*Petitioner,*

v.

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.

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MOTION OF NATURAL GAS PIPELINE COMPANY OF AMERICA, CITIES SERVICE GAS COMPANY, COLORADO INTERSTATE GAS COMPANY, EL PASO NATURAL GAS COMPANY, KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., PACIFIC NORTHWEST PIPELINE CORPORATION, PANHANDLE EASTERN PIPE LINE COMPANY, TENNESSEE GAS TRANSMISSION COMPANY, TEXAS ILLINOIS NATURAL GAS PIPELINE COMPANY AND TRANSCONTINENTAL GAS PIPE LINE CORPORATION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Natural Gas Pipeline Company of America, Cities Service Gas Company, Colorado Interstate Gas Company, El Paso Natural Gas Company, Kansas-Nebraska Natural Gas Company, Inc., Pacific Northwest Pipeline Corporation, Panhandle Eastern Pipe Line Company, Tennessee Gas Transmission Company, Texas Illinois Natural Gas Pipe-

line Company and Transcontinental Gas Pipe Line Corporation (the Companies), pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States, respectfully move for leave to file the brief *amici curiae* annexed hereto in support of the petitions of the Federal Power Commission (the Commission), United Gas Pipe Line Company (United), Texas Gas Transmission Corporation and Southern Natural Gas Company for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Consent to the filing of the brief annexed hereto was denied by three of the parties to this cause, Memphis Light, Gas and Water Division, the City of Memphis, Tennessee and Mississippi Valley Gas Company. The interest and reason for participation of the Companies are as follows:

The Companies are natural gas companies<sup>1</sup> which serve, both directly and indirectly, vast areas of the country which are dependent upon them to maintain and expand facilities required to satisfy present and growing needs for natural gas. The Companies' presently certificated combined peak day capacity is in excess of 11,250,000,000 cubic feet. They have certificate applications now pending before the Commission for the expansion of their peak day capacity by some 22% to in excess of 13,700,000,000 cubic feet. This expansion is important not only to the communities which will gain the benefits of new or increased service, but to the country as a whole, particularly at this time when new construction and employment in other industries have been sharply curtailed.

If the decision of the court below should be literally construed and held applicable to the industry at large,

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1. The term "natural gas companies" as used throughout this motion has reference only to natural gas pipeline companies so classified by and subject to the jurisdiction of the Commission.

it might necessitate refunding all or a substantial portion of more than \$240,000,000 of rate increases collected subject to refund through December 1957, and might also indefinitely postpone the effectiveness of pending rate increases aggregating more than \$215,000,000 per annum—almost equal to the combined annual net income of all natural gas companies.<sup>2</sup> The decision of the court below has already made it most difficult for some natural gas companies to obtain new financing and may, unless reversed, further jeopardize the current expansion program of the industry, for which applications for certificates of public convenience and necessity pending before the Commission as of November 30, 1957 involve an estimated investment of some \$1,184,000,000.

The bulk of interstate sales in the industry are presently made pursuant to some 1100 service agreements embodying the principle of selling at the effective tariff rates as filed with the Commission from time to time,<sup>3</sup> while only 80 "contracts" are on file with the Commission. Indeed, as the Companies are preparing to show in an appendix to be annexed to a brief which they will seek leave to file on the argument herein, if certiorari is granted, the practice of selling on the basis of a tariff and service agreement is also well established in the electric, telephone and other industries. Such flexible rate provisions are necessary to enable natural gas companies to recover promptly their fluctuating costs of service and earn a reasonable rate

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2. The net income of natural gas companies for the years ending August 31, 1956 and 1957, was \$239,422,239 and \$238,512,015, respectively. Federal Power Commission Release No. 9498, dated October 23, 1957.

3. The agreements employed by most of the Companies contain provisions similar to the one involved in the decision below. Certain of the Companies, however, have service agreements that are more explicit and these Companies reserve the right to make any applicable distinction if the occasion should arise.

of return, without which they cannot maintain existing service or meet the demand for additional service in their territories. Prior to the decision below, we know of no case requiring the purchaser's further consent to the level of rates under such a service agreement. It is only in special circumstances such as those presented in the *Mobile*<sup>4</sup> and *Sierra*<sup>5</sup> cases that special fixed rate contracts are used in the natural gas and electric industries today. Yet the court below held that, despite the purchaser's consent to the filing of rate changes by the seller, such changes can not be filed without the purchaser's further consent to the exact level of new rates. In other words, the court held that such agreements were not effective in accordance with their terms.

The Companies believe that their participation as *amici curiae* would be of substantial assistance to this Court. Of great importance to the proper resolution of the case is the experience of the industry under service agreements such as those which the court below struck down. Since the Companies represent so substantial a part of the industry, they are in a unique position to present to the Court the pertinent economic and business facts affecting the industry, consumers, investors and the general public.

The Companies also believe that they can facilitate the Court's consideration of the legal issues in this case which they believe warrant the granting of certiorari. The Court will recall that in *Mobile* both the Commission and United argued unsuccessfully that rate contracts were unenforceable under the Natural Gas Act<sup>6</sup> (the Act), and their briefs in the court below in the present case seem to us to indicate that they did not fully perceive the significance of

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4. *United Gas Pipe Line Company v. Mobile Gas Service Corporation*, 350 U. S. 332 (1956).

5. *Federal Power Commission v. Sierra Pacific Power Company*, 350 U. S. 348 (1956).

6. 52 Stat. 821, 15 U.S.C. §717 *et seq.*

this Court's decision in that case. Apparently, they accepted at least in part the erroneous concept advanced by the petitioners below that this Court's decision in *Mobile* that the purchaser's consent was a prerequisite to the filing of new rates was based upon this Court's construction of the Act itself rather than upon the contract. Describing this alleged "construction" as the "*Mobile doctrine*", they sought to argue that it should not be "extended" to this case. They also sought to support their position by reliance upon the Commission's regulations, which, while illustrative of the nature of a service agreement, are in our opinion largely irrelevant to the issues herein.

In the opinion of the undersigned, based upon his experience in briefing and arguing both *Mobile* and *Sierra*, only one very simple issue is presented on this appeal. As more fully appears from the brief hereby sought to be filed, the basic question decided by this Court in *Mobile* was that natural gas companies are as free to enter into contracts as they were before the Act. The only issue is whether it follows that where, as here, a filed service agreement concededly authorizes the seller to file rate changes under §4(d) of the Act, it was error for the court below to hold that it could not do so.

Respectfully submitted,

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December 31, 1957.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1957

No.

FEDERAL POWER COMMISSION,  
v. *Petitioner,*  
MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.

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BRIEF FOR NATURAL GAS PIPELINE COMPANY OF AMERICA, CITIES SERVICE GAS COMPANY, COLORADO INTERSTATE GAS COMPANY, EL PASO NATURAL GAS COMPANY, KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., PACIFIC NORTHWEST PIPELINE CORPORATION, PANHANDLE EASTERN PIPE LINE COMPANY, TENNESSEE GAS TRANSMISSION COMPANY, TEXAS ILLINOIS NATURAL GAS PIPELINE COMPANY AND TRANSCONTINENTAL GAS PIPE LINE CORPORATION, *AMICI CURIAE*, IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1957

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No.

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FEDERAL POWER COMMISSION,  
*Petitioner,*

*v.*

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.

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BRIEF FOR NATURAL GAS PIPELINE COMPANY OF AMERICA,  
CITIES SERVICE GAS COMPANY, COLORADO INTERSTATE GAS  
COMPANY, EL PASO NATURAL GAS COMPANY, KANSAS-  
NEBRASKA NATURAL GAS COMPANY, INC., PACIFIC NORTH-  
WEST PIPELINE CORPORATION, PANHANDLE EASTERN PIPE  
LINE COMPANY, TENNESSEE GAS TRANSMISSION COMPANY,  
TEXAS ILLINOIS NATURAL GAS PIPELINE COMPANY AND  
TRANSCONTINENTAL GAS PIPE LINE CORPORATION, *AMICI  
CURIAE*, IN SUPPORT OF PETITIONS FOR WRITS OF CER-  
TIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT

The interest of Natural Gas Pipeline Company of  
America, Cities Service Gas Company, Colorado Inter-  
state Gas Company, El Paso Natural Gas Company,  
Kansas-Nebraska Natural Gas Company, Inc., Pacific  
Northwest Pipe Line Corporation, Panhandle Eastern Pipe  
Line Company, Tennessee Gas Transmission Company,

Texas Illinois Natural Gas Pipeline Company and Transcontinental Gas Pipe Line Corporation (the Companies) in this cause is set forth in their motion to which this brief is annexed.

### **The Questions Presented**

1. Under the decision of this Court in *Mobile*<sup>1</sup>, is a natural gas company<sup>2</sup> powerless to file changes in its rate schedules without in each instance obtaining its purchasers' further consent even though its service agreements with such purchasers already authorize the company to make and file notice of such changes?

2. Under the decision of this Court in *Mobile* is the Federal Power Commission without jurisdiction to accept notice of a change in a rate schedule filed pursuant to such a service agreement?

### **Statement**

United Gas Pipe Line Company (United) entered into service agreements to sell natural gas to petitioners Texas Gas Transmission Corporation (Texas Gas) and Southern Natural Gas Company (Southern Natural) as well as to respondent Mississippi Valley Gas Company (Mississippi). Respondents Memphis Light, Gas and Water Division and the City of Memphis (Memphis) purchase gas from petitioner Texas Gas.

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1. *United Gas Pipe Line Company v. Mobile Gas Service Corporation*, 350 U. S. 332 (1956).

2. The term "natural gas company" as used throughout this brief has reference only to a natural gas pipeline company so classified by and subject to the jurisdiction of the Federal Power Commission.

The service agreements, after setting forth the term of the agreement, quantity of gas, etc., provide that "All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule \_\_\_\_\_, or any effective superseding rate schedules, on file with the Federal Power Commission." The designation of the appropriate rate schedule is inserted in the blank space, such schedule being that one of the several schedules contained in the "tariff" currently on file with the Commission which is available to customers in the particular category involved.

Relying on this provision of its agreements, United filed, and the Federal Power Commission (the Commission) accepted, schedules of rates pursuant to §4(d) of the Natural Gas Act<sup>3</sup> (the Act), superseding and increasing the rates contained in the schedules on file when the service agreements were entered into, and ordered hearings under §4(e) of the Act as to the reasonableness of the increased rates. Texas Gas, Southern Natural, Mississippi and Memphis intervened and protested only the "reasonableness" of the new rates.

Subsequently, respondents Memphis and Mississippi also filed motions with the Commission to reject the schedules of increased rates on the asserted ground that, under the decision of this Court in the *Mobile* case, such schedules could not be filed without their prior consent to the level of the new rates. The Commission found that the service agreement did not provide for a "fixed" rate, as did the contract involved in *Mobile*; but that, on the contrary, as had been conceded by Texas Gas and Southern Natural,<sup>4</sup>

3. 52 Stat. 821, 15 U.S.C. §717 *et seq.*

4. Brief for Texas Gas in Court of Appeals for District of Columbia Circuit, pp. 3, 17; Brief for Southern Natural in Court of Appeals for District of Columbia Circuit, pp. 14-15.

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"it was the understanding and intent of the contracting parties [as expressed in the above-quoted contract clause] to grant United the power to make changes in rates pursuant to section 4(d) of the Natural Gas Act, without waiver, however, of the right of the purchasers to oppose such changes in proceedings before the Commission [i.e. under §4(e)] for the purpose of testing the reasonableness and justness thereof." (*United Gas Pipe Line Co.*, 16 F.P.C. 19, 25-26 (1956))

Accordingly, the Commission denied the motions. Respondents sought review in the Court of Appeals for the District of Columbia Circuit.

### The Opinion Below

The opinion below is printed in full as an appendix to the petition filed herein by the Solicitor General. As appears therefrom, the court held in effect that under the *Mobile* case the further "consent" of the purchaser to the "level of the new rate itself" was necessary to give the Federal Power Commission "jurisdiction" to accept for filing under §4(d) and review under §4(e) of the Act any change in a rate schedule increasing rates above those in effect at the date of execution of a service agreement, even though the service agreement concededly grants to the seller the power to make and file changes in rates pursuant to §4(d).

In other words, the court below in effect held that the *Mobile* case had rendered ineffective agreements for the sale of gas at the filed or "posted" rate as the same may be changed from time to time by the seller subject to the filing and reviewing provisions of the Act.

## Reasons for Granting Certiorari

Certiorari should be granted because this case presents to this Court for the first time a fundamental question of construction and administration of an important federal statute, to wit, the validity and enforceability of the type of flexible rate provision governing the bulk of interstate sales of natural gas regulated by the Natural Gas Act. Although this question is new to this Court, the principle involved is similar to that of the *Mobile* and *Sierra*<sup>5</sup> cases. The decision of the court below, however, is in direct conflict with that principle in that it fails to recognize the validity and enforceability of contracts between natural gas companies and their customers.

The underlying error of the court below is that it proceeds on the assumption that this Court's decision in *Mobile* that a change in a fixed rate could not be made and voided without *Mobile*'s consent was based upon a construction of §§4(d) and (e) of the Act as prohibiting such a thing. It is respectfully submitted that this is a misconception of this Court's decision. The basic issue controverted throughout the *Mobile* litigation and decided by this Court in that case was whether the right to enter into contracts providing for fixed rates over a period of years had been abrogated by the Natural Gas Act. Obviously, if such contracts were permitted by the Act, they could not be changed by one party to the contract without the other party's consent. But this follows from the application of basic principles of the law of contracts, and not from any construction of §§4(d) and (e) of the Act.

5. *Federal Power Commission v. Sierra Pacific Power Company*, 350 U. S. 348 (1956).

To be sure, after construing the Act as permitting rate contracts, this Court considered the contention advanced by the Commission and United that §§4(d) and (e) of themselves authorized unilateral rate changes regardless of the provisions of the contract, and concluded that they did not. But to argue from this that this Court affirmatively held that those sections must therefore be construed as "prohibiting" the filing of rate changes from time to time even though expressly authorized by a service agreement is a complete *non sequitur*, and is directly contrary to this Court's opinion in *Mobile*.

We submit that the basic decision in *Mobile* is that, provided the provisions for notice by filing are complied with, natural gas companies are as free to enter into rate contracts today as they were before the adoption of the Act. It follows from this that whether or not a natural gas company may file changes in rates depends upon its contractual relations with the purchaser, if any, and not upon the filing provisions contained in the Act. If the selling natural gas company has agreed to serve at a fixed rate, it is without power to change the rate without the purchaser's consent. But if the purchaser has agreed to buy at whatever rates may be lawfully on file from time to time pursuant to the regulatory provisions of §§4(d) and (e) of the Act, the selling company has "power" to file and the Commission has "jurisdiction" to accept such changes under §4(d) and review them under §4(e).

The practical effect of the decision of the court below is, to all intents and purposes, to repeal §§4(d) and (e) in their entirety. Only a few wholesale sales of gas are made in this country without some form of service agreement specifying quantities, duration, point of delivery, etc. Many retail sales are also made under similar service

agreements. Such service agreements ordinarily contain some provision as to rates, and most of them contain flexible provisions similar to those in the case at bar. It is only when exceptional circumstances, such as those present in the *Mobile*, *Sierra* and *Tyler* cases, require a contract for special rates for a fixed term that the situation presented in those cases arises. If, as the court below has held, service agreements to sell at the rate from time to time on file pursuant to §§4(d) and (e), must be treated as if they were contracts for a fixed rate, there would be virtually no transactions in the gas industry to which those sections could apply and the regulatory scheme as contemplated by the Act and as spelled out in some detail by this Court in its *Mobile* and *Sierra* decisions would be rendered largely inoperative.

As indicated in our motion for leave to file this brief, the effect of such a decision on the gas industry and on the public welfare could be catastrophic.

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6. *Tyler Gas Service Co. v. Federal Power Commission*, 247 F.2d 590 (D. C. Cir. 1957), *cert. denied*, 26 U. S. L. Week 3174 (U. S. Dec. 9, 1957) (No. 520).

The basic issue decided by this Court in *Mobile* was that, subject to the requirements for notice by filing, natural gas companies are as free to enter into rate contracts under the Natural Gas Act as they were before the passage of the Act. The decision that Mobile's "consent" was a prerequisite to a change of rates followed as a matter of course from the law of contracts and not from the filing provisions of the Act.

In considering the opinion of this Court in *Mobile* it must be borne in mind at the outset that in that case this Court was considering a contract for the sale of gas at a special low rate for a term of years, which had been agreed to by United in order to secure a valuable new customer. Thus, whenever the word "contract" is used in that case, it is that kind of special rate contract that is referred to, and not, as the court below erroneously assumed, any kind of rate contract or service agreement regardless of its terms. With this in mind, it will be helpful to consider the posture in which the case reached this Court.

Mobile throughout contended that its contract was valid and binding and that *therefore* the contract rates could not be changed without its consent. The Commission and United on the other hand argued that under what they described as the "filed rate procedure" provided for in the Act, any rates could be changed at any time by a unilateral filing, so that private rate contracts were to all intents and purposes abrogated by the Act itself. This Court posed that issue as follows:

"The question presented in this case is whether under the Natural Gas Act, 52 Stat. 821, 15 U.S.C.

§717 *et seq.*, a regulated natural gas company furnishing gas to a distributing company under a long-term contract may, without the consent of the distributing company, change the rate specified in the contract simply by filing a new rate schedule with the Federal Power Commission." (350 U. S. 332, 333-334)

A. This Court determined at the outset that the Act itself does not prohibit private rate contracts.

It is obvious that the first question to be determined in resolving the issue presented in *Mobile* was whether or not rate contracts were permitted under the Act, for as this Court pointed out in its opinion, "Absent the Act, a unilateral announcement of a change to a contract would of course be a nullity, . . .".<sup>7</sup> Accordingly, this Court first devoted its attention to the solution of that issue:

"In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts. In this respect, the Act is in marked contrast to the Interstate Commerce Act, which in effect precludes private rate agreements . . .". (350 U. S. 332, 338)

After discussing the difference between the regulation of "the vast number of retail transactions of railroads" with the regulation of the "relatively few wholesale transactions" regulated by the Natural Gas Act, which

<sup>7</sup> 350 U. S. 332, 339.

"typically require substantial investment in capacity and facilities", this Court concluded:

"\* \* \* Recognizing the need these circumstances create for individualized arrangements between natural gas companies and distributors, the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public."  
(350 U. S. 332, 339)

- B. This Court next considered and rejected the contention that the Act of itself *authorized* unilateral changes of rates even though fixed by contract, and the court below erroneously construed this as a decision that the Act *prohibited* even those rate changes authorized by the terms of the contract.**

Having determined that on its face the Act did not prohibit rate contracts, this Court turned to the contention of the Commission and United that §§4(d) and (e) expressly authorized unilateral changes of all rates, thus, in effect, nullifying all fixed rate contracts. After a detailed examination of the provisions of §§4(d) and (e) of the Act, this Court rejected that contention on the ground that the Act "does not empower natural gas companies unilaterally to change their contracts".<sup>8</sup> The underlying error of the court below is that it assumed that in reaching this conclusion this Court was affirmatively construing §§4(d) and (e) of the Act as *prohibiting* any change in "contract rates" without the purchaser's consent.

This is a *non sequitur*. That it is also a misconception of this Court's opinion is apparent from this Court's introduction to its discussion of this problem:

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8. 350 U. S. 332, 344.

“ \* \* \* It is argued that this provision [§4(d)] authorizes a natural gas company to change its rate contracts simply by filing a new schedule of rates, to go into effect in no less than thirty days. On its face, however, §4(d) is simply a prohibition, not a grant of power. \* \* \* In short, §4(d) on its face indicates no more than that *otherwise valid changes* [e.g., changes not barred by contract] cannot be put into effect without giving the required notice to the Commission. To find in the section a further purpose to empower natural gas companies to change their contracts unilaterally requires reading into it language that is neither there nor reasonably implied.” (Emphasis supplied) (350 U. S. 332, 339-340)

After considering the filing and reviewing provisions of the Act, the Court concluded:

“ \* \* \* Hence, there is nothing in the structure or purpose of the Act from which we can infer the right, *not otherwise possessed* and nowhere expressly given by the Act, of natural gas companies unilaterally to change their contracts.” (Emphasis supplied) (350 U. S. 332, 343-344)

Thus it is plain beyond peradventure that this Court did not construe §4(d) as placing any limitations either upon the “power” of natural gas companies to file rate changes which they were not otherwise prohibited from filing, as by a contract for a fixed rate, or on the jurisdiction of the Commission to file and review such changes, as the court below erroneously assumed.<sup>9</sup> On the contrary, as this Court was at pains to point out:

9. We are at a loss to understand the basis of the Court of Appeals’ decision that the Commission lacked “jurisdiction.” There is not a word in this Court’s opinion in *Mobile*, or in the companion *Sierra* case, nor in any opinions of the courts below in those cases, in any way dealing with the Commission’s “jurisdiction” to accept and review filed rate schedules. The question was not one of the “jurisdiction” of the Commission, but solely of the “power” of natural gas companies to file rate changes.

“\* \* \* If the purported change is one the natural gas company has the *power* to make, [i.e., if it has not contracted that power away] the ‘change’ is completed upon compliance with the notice requirement and the new rate has the same force as any other rate—it can be set aside only upon being found unlawful by the Commission. \* \* \*” (Emphasis supplied) (350 U. S. 332, 342)

**C. Under the decision in *Mobile* natural gas companies are as free to enter into rate contracts as they were before the passage of the Act.**

As further evidence that this Court was not construing the Act itself as limiting the rights of natural gas companies to enter into rate contracts or to make and change rates, we point to the following:

“\* \* \* Admittedly, the Act presumes a capacity in natural gas companies to make rates and contracts and to change them from time to time, but nowhere in the Act is either power defined. The obvious implication is that, except as specifically limited by the Act, [i.e., the requirement of notice by filing] the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act \* \* \*”. (350 U. S. 332, 343)

And again, to the same effect:

“\* \* \* The Act \* \* \* purports neither to grant nor to define the initial rate-setting powers of natural gas companies. \* \* \* The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act.” (350 U. S. 332, 341, 343)

Thus we submit that it is abundantly clear that all this Court decided in *Mobile* was that, subject only to

the requirement of notice by filing, natural gas companies are as free to enter into rate contracts as they were before the Act was adopted.

## II

It follows from this Court's decision in *Mobile* that whether or not a new rate schedule may be filed without the purchaser's consent depends not upon the Act but upon the terms of the contract or service agreement. If a service agreement provides for payment in accordance with schedules filed from time to time under §4(d), the Commission not only "may" but *must* accept such filings.

At the outset of its discussion of the filing provisions of the Act in *Mobile*, this Court, speaking of the special contract involved in that case, pointed out that "Absent the Act, a unilateral announcement of a change to a contract would of course be a nullity, \* \* \*".<sup>10</sup> After concluding that the Act did not limit the power of natural gas companies to enter into rate contracts, the Court concluded:

"\* \* \* it follows that the new schedule filed by United was a nullity insofar as it purported to change the rate set by its contract with Mobile and that the contract rate remained the only lawful rate." (350 U. S. 332, 347)

We submit that it is self evident that this Court reached that conclusion on the basis of the contract, and not on a "construction" of §§4(d) and (e). Indeed, the Court itself described its decision as "preserving the integrity of contracts" (350 U. S. 332, 344).

10. 350 U. S. 332, 339.

It follows inexorably that where, as here, a service agreement provides for payment at the "Seller's Rate Schedule—or any effective superseding rate schedules on file with the Federal Power Commission"—and it was conceded by Texas Gas and Southern Natural, and found by the Commission, that this means that the seller had contractual authority to file changes pursuant to §4(d) of the Act subject to review and modification by the Commission pursuant to §4(e)—the decision of this Court in *Mobil* requires that the "integrity" of that contract be preserved: United has the "power" to file, and the Commission is obligated to accept for filing and has "jurisdiction" to review, such changes in rate schedules as United may deem reasonable and proper.<sup>11</sup>

There can be no doubt that a contract to purchase gas at a rate to be determined from time to time, let us say by three arbitrators named in the contract, or on the basis of a published "index" or market quotation, would be valid and lawful "absent the Act", and would authorize rate changes in accordance with its terms. As there is nothing in the Act limiting the power of natural gas companies to make such contracts as they had the power to make before the Act (provided the notice and filing provisions are observed), it follows that a contract providing that the rates may be changed and filed pursuant to the express filing and reviewing provisions of the Act is equally valid. Nor does such a provision have the effect of "vesting" the Commission with any "arbitration function" or any other power not given to it by the Act.

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11. We are also at a loss to perceive the basis of the distinction sought to be drawn by the court below between a "consent" to such filing, and a "consent" to the "exact level of rates". Section 4(d) expressly requires the filing of any change in rates, and an agreement to comply with that requirement would be entirely superfluous.

as erroneously assumed by the court below. The Commission merely accepts schedules which a natural gas company has the "power" to file, and deals with them in the same manner as it would any other schedules filed under §4(d) which a natural gas company has the power to file. Under the express decision of this Court in *Mobile*, since the "purported change" is here one which the company has the "power" to make under its contract, the "change" is completed upon the filing of notice under §4(d) "and the new rate has the same force as any other rate—it can be set aside only upon being found unlawful by the Commission."<sup>12</sup> The Commission's power to review that rate is vested in it by the Act, and not by the contract.

The rate provisions of the service agreements here in issue are valid and enforceable: United can file rate changes pursuant to §4(d) when it deems such action advisable without first obtaining the purchaser's consent to the "level of new rates."

### III

Service agreements providing for the terms and conditions of purchase at whatever rates are lawfully filed by the seller from time to time are widely used in regulated industries and are basically different in purpose and intent from the special fixed rate contracts involved in *Mobile* and *Sierra*.

The great majority of service agreements currently in effect between natural gas companies and their various wholesale customers provide that the gas shall be paid for in accordance with designated rate schedules as changed

12. 350 U. S. 332, 342.

and filed by the companies from time to time pursuant to §4(d) of the Act. Such flexible rate provisions are radically different in form, purpose, and substance, from contracts providing for sales at special low rates over a term of years such as those involved in *Mobile*, *Sierra* and *Tyler*. In the situations involved in those cases, as is apparent from the courts' opinions, without the special contracts there would have been no sales: Ideal Cement Company would not have established a plant in Mobile if it had not had the assurance of the low rate for ten years, and Sierra and Tyler would have purchased from competing suppliers if they had not been offered a fixed contract at competitive rates. Under such circumstances, if the selling company wants the business, it has to agree to a special low rate, to remain fixed for a specified term of years. And as this Court held in *Mobile* and *Sierra*, having obtained the business, the company is bound by its contract.

But it must be borne in mind that the contracts involved in those cases involved only a small portion of the selling company's gross sales, and a moment's reflection will indicate that if a company conducts all or most of its business on the basis of such contracts, a period of rising construction costs would immediately impair the financial ability of companies to meet demands for expanded service. For rates that might produce a "reasonable return" on investments made prior to 1946, when the *Mobile* and *Tyler* contracts were entered into, would not support the financial outlays necessary for the substantial expansion required in 1957.

When this is borne in mind in the light of the era of rapidly increasing costs during the past ten years, coupled as it was by an unprecedented expansion in the capacity

of natural gas companies," it will readily be seen that some form of flexible price structure generally applicable to the majority of sales of natural gas was essential to the healthy growth of the industry.

The normal and customary method of maintaining the rate flexibility necessary for a proper performance of a regulated public service company's functions, including expansion to meet increased demands, is to offer service at whatever rates are currently "posted", i.e., on file from time to time under the supervision of the appropriate regulatory authority.<sup>13</sup> Under such arrangements, the interest of the purchaser in paying only a reasonable rate is protected by the filing and review provisions of the appropriate act: no change in rates can be made unless the Commission is given the opportunity to review and determine whether the new rate is within the "zone of reasonableness".

During the recent period of great expansion in the gas industry it became more and more apparent that this approach to "rate making" was both necessary and appropriate. The expansion of course was made necessary by the fact that demand exceeded supply. The primary concern of purchasers was to obtain gas, and the principal subject of bargaining between buyer and seller related to quantity and term of the contract. In the absence

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13. The estimated cost of new facilities certificated for construction by the Commission between July 1, 1946 and June 30, 1947 aggregated \$5,660,554,000.

14. As we will be prepared to show in the appendix which we are preparing for a brief on the merits if certiorari is granted, this is the method widely in use for many years in retail transactions, not only in the gas industry but in the electric and telephone industries as well. And of course it is customary in many unregulated industries to contract for the purchase of goods at the seller's "list" or "posted" price at the time of delivery, or at prices determined by published price or cost indices, etc.

of such special circumstances as are illustrated by the *Mobile, Sierra and Tyler* cases, purchasers were generally satisfied to pay a "reasonable" price for the gas, and of course the filing, review and modification provisions of §§4(d) and (e), as supplemented by §5(a), furnish the machinery necessary for the accomplishment of that result.

Moreover, the Commission, by its Order No. 144 of 1948, issued primarily in order to obtain greater uniformity in rates and to simplify the task of regulation, directed gas companies to file their rates in tariff form wherever possible.

As a result of these circumstances, the records of the Commission show that as of today there are on file with the Commission some 1100 service agreements providing in one form or another for rates to be changed from time to time under the filing and review provisions of the Act, as against only 80 rate contracts.

It is also to be borne in mind that the great expansion of the past ten years has taken place on the assumption by all parties—pipe line companies, distributing companies, financial houses and purchasers of the companies' securities—that such service agreements permitted rate changes in accordance with their intended purpose. Yet the decision below if literally construed seems to nullify such agreements, thus raising the gravest doubts as to the status of some \$216,000,000 *per annum* currently being collected by natural gas companies subject to refund—over 90% of the aggregate net profit of the entire industry during each of the past two years. It also places in jeopardy current plans for expansion for which applications for certificates are now pending before the Commission, aggregating \$1,184,000,000 in estimated construction costs. Moreover, there is a serious question as to how

and whether natural gas companies can modify their methods of making and changing rates to comply with the construction placed upon the Act by the decision below, and yet at the same time provide a satisfactory base on which to finance future expansion.

For if, as the decision below seems to hold, the only way in which a rate contained in a rate schedule to which a service agreement refers can be increased without the negotiation of a new agreement with each individual customer, is by a proceeding under §5(a), there will be no assurance that the company's rates can be kept at a level sufficient to produce a "reasonable return" on its investment. As this Court expressly pointed out in *Sierra*, in speaking of the Commission's powers in a §5(a) type of proceeding<sup>15</sup> to review a rate producing less than a fair return on investment:

"\* \* \* while it may be that the Commission may not normally impose upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain. \* \* \* In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory. \* \* \*" (350 U. S. 348, 355)

It would seem to follow from this that if, as the Court below held, all rates embodied in service agreements are frozen until and unless the purchaser agrees to a specific increase, or the agreements are set aside under §5(a), the

15. I.e., §206(a) of the Federal Power Act, 49 Stat. 847, 16 U.S.C. §824 *et seq.*, which is the counterpart of §5(a) of the Act.

rates would remain static until pipe line companies were already in serious financial difficulties.

Moreover, it must be borne in mind that the procedure for setting aside contract rates under §5(a) is far more difficult, cumbersome and time consuming than the procedure for modifying under §4(e) new rates which the seller has the authority to file. Under the latter, the issue is whether the new rate is "within the zone of reasonableness". But, as we have just seen, in a §5(a) proceeding to set aside a rate embodied in a contract, it is first necessary for the Commission to determine that the rate is so low as to adversely affect the public interest—a question involving the consideration of many economic problems besides "rate of return". After having made that determination, the Commission must then proceed to determine and fix a new and "reasonable" rate.

We respectfully submit that this Court should review a decision of a court of appeals which seems to bring about so fundamental and drastic a change in the regulatory provisions of the Act, as they have hitherto been construed and understood.

### CONCLUSION

**The petitions for certiorari should be granted.**

Respectfully submitted,

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December 31, 1957.

## Certificate of Service

I, WILLIAM C. CHANLER, attorney for *Amici Curiae*, and a member of the Bar of the Supreme Court of the United States, do hereby certify that I have served, upon the Solicitor General of the United States, an attorney of record for the Federal Power Commission and counsel of record for each other party, a copy of the foregoing motion for leave to file a brief *amici curiae* in support of petitions for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit, and a copy of such brief, by depositing true and correct copies thereof in the United States Mail, first class airmail postage prepaid (except as indicated by \* in which case first class postage prepaid was used), on December 31, 1957, addressed as follows:

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These being the names and post office addresses for such  
service as appears to me from the briefs in this cause in  
the court below and from drafts of the petitions for  
certiorari herein.

WILLIAM C. CHANLER

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William C. Chanler,  
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DEC 31 1957

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1958

No. ~~101~~ 25

FEDERAL POWER COMMISSION,  
v. *Petitioner,*

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.

**MOTION OF NATURAL GAS PIPELINE COMPANY OF AMERICA, CITIES SERVICE GAS COMPANY, COLORADO INTERSTATE GAS COMPANY, EL PASO NATURAL GAS COMPANY, KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., PACIFIC NORTHWEST PIPELINE CORPORATION, PANHANDLE EASTERN PIPE LINE COMPANY, TENNESSEE GAS TRANSMISSION COMPANY, TEXAS ILLINOIS NATURAL GAS PIPELINE COMPANY AND TRANSCONTINENTAL GAS PIPE LINE CORPORATION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1957

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No.

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FEDERAL POWER COMMISSION,  
*Petitioner,*

v.

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.

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MOTION OF NATURAL GAS PIPELINE COMPANY OF AMERICA, CITIES SERVICE GAS COMPANY, COLORADO INTERSTATE GAS COMPANY, EL PASO NATURAL GAS COMPANY, KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., PACIFIC NORTHWEST PIPELINE CORPORATION, PANHANDLE EASTERN PIPE LINE COMPANY, TENNESSEE GAS TRANSMISSION COMPANY, TEXAS ILLINOIS NATURAL GAS PIPELINE COMPANY AND TRANCONTINENTAL GAS PIPE LINE CORPORATION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Natural Gas Pipeline Company of America, Cities Service Gas Company, Colorado Interstate Gas Company, El Paso Natural Gas Company, Kansas-Nebraska Natural Gas Company, Inc., Pacific Northwest Pipeline Corporation, Panhandle Eastern Pipe Line Company, Tennessee Gas Transmission Company, Texas Illinois Natural Gas Pipe-

line Company and Transcontinental Gas Pipe Line Corporation (the Companies), pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States, respectfully move for leave to file the brief *amici curiae* annexed hereto in support of the petitions of the Federal Power Commission (the Commission), United Gas Pipe Line Company (United), Texas Gas Transmission Corporation and Southern Natural Gas Company for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Consent to the filing of the brief annexed hereto was denied by three of the parties to this cause, Memphis Light, Gas and Water Division, the City of Memphis, Tennessee and Mississippi Valley Gas Company. The interest and reason for participation of the Companies, are as follows:

The Companies are natural gas companies<sup>1</sup> which serve, both directly and indirectly, vast areas of the country which are dependent upon them to maintain and expand facilities required to satisfy present and growing needs for natural gas. The Companies' presently certificated combined peak day capacity is in excess of 11,250,000,000 cubic feet. They have certificate applications now pending before the Commission for the expansion of their peak day capacity by some 22% to in excess of 13,700,000,000 cubic feet. This expansion is important not only to the communities which will gain the benefits of new or increased service, but to the country as a whole, particularly at this time when new construction and employment in other industries have been sharply curtailed.

If the decision of the court below should be literally construed and held applicable to the industry at large,

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1. The term "natural gas companies" as used throughout this motion has reference only to natural gas pipeline companies so classified by and subject to the jurisdiction of the Commission.

it might necessitate refunding all or a substantial portion of more than \$240,000,000 of rate increases collected subject to refund through December 1957, and might also indefinitely postpone the effectiveness of pending rate increases aggregating more than \$215,000,000 per annum—almost equal to the combined annual net income of all natural gas companies.<sup>2</sup> The decision of the court below has already made it most difficult for some natural gas companies to obtain new financing and may, unless reversed, further jeopardize the current expansion program of the industry, for which applications for certificates of public convenience and necessity pending before the Commission as of November 30, 1957 involve an estimated investment of some \$1,184,000,000.

The bulk of interstate sales in the industry are presently made pursuant to some 1100 service agreements embodying the principle of selling at the effective tariff rates as filed with the Commission from time to time,<sup>3</sup> while only 80 "contracts" are on file with the Commission. Indeed, as the Companies are preparing to show in an appendix to be annexed to a brief which they will seek leave to file on the argument herein, if certiorari is granted, the practice of selling on the basis of a tariff and service agreement is also well established in the electric, telephone and other industries. Such flexible rate provisions are necessary to enable natural gas companies to recover promptly their fluctuating costs of service and earn a reasonable rate

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2. The net income of natural gas companies for the years ending August 31, 1956 and 1957, was \$239,422,239 and \$238,512,015, respectively. Federal Power Commission Release No. 9498, dated October 23, 1957.

3. The agreements employed by most of the Companies contain provisions similar to the one involved in the decision below. Certain of the Companies, however, have service agreements that are more explicit and these Companies reserve the right to make any applicable distinction if the occasion should arise.

of return, without which they cannot maintain existing service or meet the demand for additional service in their territories. Prior to the decision below, we know of no case requiring the purchaser's further consent to the level of rates under such a service agreement. It is only in special circumstances such as those presented in the *Mobile*<sup>4</sup> and *Sierra*<sup>5</sup> cases that special fixed rate contracts are used in the natural gas and electric industries today. Yet the court below held that, despite the purchaser's consent to the filing of rate changes by the seller, such changes can not be filed without the purchaser's further consent to the exact level of new rates. In other words the court held that such agreements were not effective in accordance with their terms.

The Companies believe that their participation as *amicus curiae* would be of substantial assistance to this Court. Of great importance to the proper resolution of the case is the experience of the industry under service agreements such as those which the court below struck down. Since the Companies represent so substantial a part of the industry, they are in a unique position to present to the Court the pertinent economic and business facts affecting the industry, consumers, investors and the general public.

The Companies also believe that they can facilitate the Court's consideration of the legal issues in this case which they believe warrant the granting of certiorari. The Court will recall that in *Mobile* both the Commission and United argued in opposition to, and the undersigned in support of, the proposition ultimately sustained by this Court: that natural gas companies are as free to enter into contracts under the Natural Gas Act<sup>6</sup> (the Act) as

4. *United Gas Pipe Line Company v. Mobile Gas Service Corporation*, 350 U. S. 332 (1956).

5. *Federal Power Commission v. Sierra Pacific Power Company*, 350 U. S. 348 (1956).

6. 52 Stat. 821, 15 U.S.C. §717 et seq.

they were before its adoption. The issue on this appeal is the proper application of that decision to the case at bar, and it is believed that it will be helpful to the Court to have before it the views of those who were on each side of the controversy in that case. As will appear more fully from the brief hereby sought to be filed, it is the opinion of the undersigned, based upon experience not only in *Mobile* but also in *Sierra*, that the decision below was based upon a misconception of the decisions of this Court in those cases, and must be reversed for a very simple reason: As natural gas companies are free to enter into rate contracts under the Act, a service agreement such as that here in issue which authorizes the seller to file rate changes must be enforced in accordance with its terms.

Respectfully submitted,

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December 31, 1957.

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IN THE  
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OCTOBER TERM, 1957

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FEDERAL POWER COMMISSION,  
v. *Petitioner,*

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.

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BRIEF FOR NATURAL GAS PIPELINE COMPANY OF AMERICA, CITIES SERVICE GAS COMPANY, COLORADO INTERSTATE GAS COMPANY, EL PASO NATURAL GAS COMPANY, KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., PACIFIC NORTHWEST PIPELINE CORPORATION, PANHANDLE EASTERN PIPE LINE COMPANY, TENNESSEE GAS TRANSMISSION COMPANY, TEXAS ILLINOIS NATURAL GAS PIPELINE COMPANY AND TRANSCONTINENTAL GAS PIPE LINE CORPORATION, *AMICI CURIAE*, IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.

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BRIEF FOR NATURAL GAS PIPELINE COMPANY OF AMERICA, CITIES SERVICE GAS COMPANY, COLORADO INTERSTATE GAS COMPANY, EL PASO NATURAL GAS COMPANY, KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., PACIFIC NORTHWEST PIPELINE CORPORATION, PANHANDLE EASTERN PIPE LINE COMPANY, TENNESSEE GAS TRANSMISSION COMPANY, TEXAS ILLINOIS NATURAL GAS PIPELINE COMPANY AND TRANSCONTINENTAL GAS PIPE LINE CORPORATION, *AMICI CURIAE*, IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The interest of Natural Gas Pipeline Company of America, Cities Service Gas Company, Colorado Interstate Gas Company, El Paso Natural Gas Company, Kansas-Nebraska Natural Gas Company, Inc., Pacific Northwest Pipe Line Corporation, Panhandle Eastern Pipe Line Company, Tennessee Gas Transmission Company,

Texas Illinois Natural Gas Pipeline Company and Transcontinental Gas Pipe Line Corporation (the Companies) in this cause is set forth in their motion to which this brief is annexed.

### The Questions Presented

1. Under the decision of this Court in *Mobile*<sup>1</sup>, is a natural gas company<sup>2</sup> powerless to file changes in its rate schedules without in each instance obtaining its purchasers' further consent even though its service agreements with such purchasers already authorize the company to make and file notice of such changes?

2. Under the decision of this Court in *Mobile* is the Federal Power Commission without jurisdiction to accept notice of a change in a rate schedule filed pursuant to such a service agreement?

### Statement

United Gas Pipe Line Company (United) entered into service agreements to sell natural gas to petitioners Texas Gas Transmission Corporation (Texas Gas) and Southern Natural Gas Company (Southern Natural) as well as to respondent Mississippi Valley Gas Company (Mississippi). Respondents Memphis Light, Gas and Water Division and the City of Memphis (Memphis) purchase gas from petitioner Texas Gas.

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1. *United Gas Pipe Line Company v. Mobile Gas Service Corporation*, 350 U. S. 332 (1956).

2. The term "natural gas company" as used throughout this brief has reference only to a natural gas pipeline company so classified by and subject to the jurisdiction of the Federal Power Commission.

The service agreements, after setting forth the term of the agreement, quantity of gas, etc., provide that "All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule \_\_\_\_\_, or any effective superseding rate schedules, on file with the Federal Power Commission." The designation of the appropriate rate schedule is inserted in the blank space, such schedule being that one of the several schedules contained in the "tariff" currently on file with the Commission which is available to customers in the particular category involved.

Relying on this provision of its agreements, United filed, and the Federal Power Commission (the Commission) accepted, schedules of rates pursuant to §4(d) of the Natural Gas Act<sup>3</sup> (the Act), superseding and increasing the rates contained in the schedules on file when the service agreements were entered into, and ordered hearings under §4(e) of the Act as to the reasonableness of the increased rates. Texas Gas, Southern Natural, Mississippi and Memphis intervened and protested only the "reasonableness" of the new rates.

Subsequently, respondents Memphis and Mississippi also filed motions with the Commission to reject the schedules of increased rates on the asserted ground that, under the decision of this Court in the *Mobile* case, such schedules could not be filed without their prior consent to the level of the new rates. The Commission found that the service agreement did not provide for a "fixed" rate, as did the contract involved in *Mobile*, but that, on the contrary, as had been conceded by Texas Gas and Southern Natural,<sup>4</sup>

3. 52 Stat. 821, 15 U.S.C. §717 *et seq.*

4. Brief for Texas Gas in Court of Appeals for District of Columbia Circuit, pp. 3, 17; Brief for Southern Natural in Court of Appeals for District of Columbia Circuit, pp. 14-15.

"it was the understanding and intent of the contracting parties [as expressed in the above-quoted contract clause] to grant United the power to make changes in rates pursuant to section 4(d) of the Natural Gas Act, without waiver, however, of the right of the purchasers to oppose such changes in proceedings before the Commission [i.e. under §4(e)] for the purpose of testing the reasonableness and justness thereof." (*United Gas Pipe Line Co.*, 16 F.P.C. 19, 25-26 (1956))

Accordingly, the Commission denied the motions. Respondents sought review in the Court of Appeals for the District of Columbia Circuit.

### **The Opinion Below**

The opinion below is printed in full as an appendix to the petition filed herein by the Solicitor General. As appears therefrom, the court held in effect that under the *Mobile* case the further "consent" of the purchaser to the "level of the new rate itself" was necessary to give the Federal Power Commission "jurisdiction" to accept for filing under §4(d) and review under §4(e) of the Act any change in a rate schedule increasing rates above those in effect at the date of execution of a service agreement, even though the service agreement concededly grants to the seller the power to make and file changes in rates pursuant to §4(d).

In other words, the court below in effect held that the *Mobile* case had rendered ineffective agreements for the sale of gas at the filed or "posted" rate as the same may be changed from time to time by the seller subject to the filing and reviewing provisions of the Act.

## Reasons for Granting Certiorari

Certiorari should be granted because this case presents to this Court for the first time a fundamental question of construction and administration of an important federal statute, to wit, the validity and enforceability of the type of flexible rate provision governing the bulk of interstate sales of natural gas regulated by the Natural Gas Act. Although this question is new to this Court, the principle involved is similar to that of the *Mobile* and *Sierra*<sup>5</sup> cases. The decision of the court below, however, is in direct conflict with that principle in that it fails to recognize the validity and enforceability of contracts between natural gas companies and their customers.

The underlying error of the court below is that it proceeds on the assumption that this Court's decision in *Mobile* that a change in a fixed rate could not be made and filed without *Mobile*'s consent was based upon a construction of §§4(d) and (e) of the Act as prohibiting such a filing. It is respectfully submitted that this is a misconception of this Court's decision. The basic issue controverted throughout the *Mobile* litigation and decided by this Court in that case was whether the right to enter into contracts providing for fixed rates over a period of years had been abrogated by the Natural Gas Act. Obviously, if such contracts were permitted by the Act, they could not be changed by one party to the contract without the other party's consent. But this follows from the application of basic principles of the law of contracts, and not from any construction of §§4(d) and (e) of the Act.

5. *Federal Power Commission v. Sierra Pacific Power Company*, 350 U. S. 348 (1956).

To be sure, after construing the Act as permitting rate contracts, this Court considered the contention advanced by the Commission and United that §§4(d) and (e) of themselves authorized unilateral rate changes regardless of the provisions of the contract, and concluded that they did not. But to argue from this that this Court affirmatively held that those sections must therefore be construed as "prohibiting" the filing of rate changes from time to time even though expressly authorized by a service agreement is a complete *non sequitur*, and is directly contrary to this Court's opinion in *Mobile*.

We submit that the basic decision in *Mobile* is that, provided the provisions for notice by filing are complied with, natural gas companies are as free to enter into rate contracts today as they were before the adoption of the Act. It follows from this that whether or not a natural gas company may file changes in rates depends upon its contractual relations with the purchaser, if any, and not upon the filing provisions contained in the Act. If the selling natural gas company has agreed to serve at a fixed rate, it is without power to change the rate without the purchaser's consent. But if the purchaser has agreed to buy at whatever rates may be lawfully on file from time to time pursuant to the regulatory provisions of §§4(d) and (e) of the Act, the selling company has "power" to file and the Commission has "jurisdiction" to accept such changes under §4(d) and review them under §4(e).

The practical effect of the decision of the court below is, to all intents and purposes, to repeal §§4(d) and (e) in their entirety. Only a few wholesale sales of gas are made in this country without some form of service agreement specifying quantities, duration, point of delivery, etc. Many retail sales are also made under similar service

agreements. Such service agreements ordinarily contain some provision as to rates, and most of them contain flexible provisions similar to those in the case at bar. It is only when exceptional circumstances, such as those present in the *Mobile*, *Sierra* and *Tyler*<sup>6</sup> cases, require a contract for special rates for a fixed term that the situation presented in those cases arises. If, as the court below has held, service agreements to sell at the rate from time to time on file pursuant to §§4(d) and (e), must be treated as if they were contracts for a fixed rate, there would be virtually no transactions in the gas industry to which those sections could apply and the regulatory scheme as contemplated by the Act and as spelled out in some detail by this Court in its *Mobile* and *Sierra* decisions would be rendered largely inoperative.

As indicated in our motion for leave to file this brief, the effect of such a decision on the gas industry and on the public welfare could be catastrophic.

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6. *Tyler Gas Service Co. v. Federal Power Commission*, 247 F. 2d 590 (D. C. Cir. 1957), cert. denied, 26 U. S. L. Week 3174 (U. S. Dec. 9, 1957) (No. 520).

## I

The basic issue decided by this Court in *Mobile* was that, subject to the requirements for notice by filing, natural gas companies are as free to enter into rate contracts under the Natural Gas Act as they were before the passage of the Act. The decision that Mobile's "consent" was a prerequisite to a change of rates followed as a matter of course from the law of contracts and not from the filing provisions of the Act.

In considering the opinion of this Court in *Mobile* it must be borne in mind at the outset that in that case this Court was considering a contract for the sale of gas at a special low rate for a term of years, which had been agreed to by United in order to secure a valuable new customer. Thus, whenever the word "contract" is used in that case, it is that kind of special rate contract that is referred to, and not, as the court below erroneously assumed, any kind of rate contract or service agreement regardless of its terms. With this in mind, it will be helpful to consider the posture in which the case reached this Court.

Mobile throughout contended that its contract was valid and binding and that *therefore* the contract rates could not be changed without its consent. The Commission and United on the other hand argued that under what they described as the "filed rate procedure" provided for in the Act, any rates could be changed at any time by a unilateral filing, so that private rate contracts were to all intents and purposes abrogated by the Act itself. This Court posed that issue as follows:

"The question presented in this case is whether under the Natural Gas Act, 52 Stat. 821, 15 U.S.C.

§717 *et seq.*, a regulated natural gas company furnishing gas to a distributing company under a long-term contract may, without the consent of the distributing company, change the rate specified in the contract simply by filing a new rate schedule with the Federal Power Commission." (350 U. S. 332, 333-334)

A. This Court determined at the outset that the Act itself does not prohibit private rate contracts.

It is obvious that the first question to be determined in resolving the issue presented in *Mobile* was whether or not rate contracts were permitted under the Act, for as this Court pointed out in its opinion, "Absent the Act, a unilateral announcement of a change to a contract would of course be a nullity, \* \* \*". Accordingly, this Court first devoted its attention to the solution of that issue:

"In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts. In this respect, the Act is in marked contrast to the Interstate Commerce Act, which in effect precludes private rate agreements \* \* \*". (350 U. S. 332, 338)

After discussing the difference between the regulation of "the vast number of retail transactions of railroads" with the regulation of the "relatively few wholesale transactions" regulated by the Natural Gas Act, which

“typically require substantial investment in capacity and facilities”, this Court concluded:

“ \* \* \* Recognizing the need these circumstances create for individualized arrangements between natural gas companies and distributors, the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public.”  
(350 U. S. 332, 339)

**B. This Court next considered and rejected the contention that the Act of itself *authorized* unilateral changes of rates even though fixed by contract, and the court below erroneously construed this as a decision that the Act *prohibited* even those rate changes authorized by the terms of the contract.**

Having determined that on its face the Act did not prohibit rate contracts, this Court turned to the contention of the Commission and United that §§4(d) and (e) expressly authorized unilateral changes of all rates, thus, in effect, nullifying all fixed rate contracts. After a detailed examination of the provisions of §§4(d) and (e) of the Act, this Court rejected that contention on the ground that the Act “does not empower natural gas companies unilaterally to change their contracts”.<sup>8</sup> The underlying error of the court below is that it assumed that in reaching this conclusion this Court was affirmatively construing §§4(d) and (e) of the Act as *prohibiting* any change in “contract rates” without the purchaser’s consent.

This is a *non sequitur*. That it is also a misconception of this Court’s opinion is apparent from this Court’s introduction to its discussion of this problem:

<sup>8</sup> 350 U. S. 332, 344.

"\* \* \* It is argued that this provision [§4(d)] authorizes a natural gas company to change its rate contracts simply by filing a new schedule of rates, to go into effect in no less than thirty days. On its face, however, §4(d) is simply a prohibition, not a grant of power. \* \* \* In short, §4(d) on its face indicates no more than that *otherwise valid changes* [e.g., changes not barred by contract] cannot be put into effect without giving the required notice to the Commission. To find in the section a further purpose to empower natural gas companies to change their contracts unilaterally requires reading into it language that is neither there nor reasonably implied." (Emphasis supplied) (350 U. S. 332, 339-340)

After considering the filing and reviewing provisions of the Act, the Court concluded:

"\* \* \* Hence, there is nothing in the structure or purpose of the Act from which we can infer the right, *not otherwise possessed* and nowhere expressly given by the Act, of natural gas companies unilaterally to change their contracts." (Emphasis supplied) (350 U. S. 332, 343-344)

Thus it is plain beyond peradventure that this Court did not construe §4(d) as placing any limitations either upon the "power" of natural gas companies to file rate changes which they were not otherwise prohibited from filing, as by a contract for a fixed rate, or on the jurisdiction of the Commission to file and review such changes, as the court below erroneously assumed.<sup>9</sup> On the contrary, as this Court was at pains to point out:

9. We are at a loss to understand the basis of the Court of Appeals' decision that the Commission lacked "jurisdiction." There is not a word in this Court's opinion in *Mobile*, or in the companion *Sierra* case, nor in any opinions of the courts below in those cases, in any way dealing with the Commission's "jurisdiction" to accept and review filed rate schedules. The question was not one of the "jurisdiction" of the Commission, but solely of the "power" of natural gas companies to file rate changes.

“\* \* \* If the purported change is one the natural gas company has the power to make, [i.e., if it has not contracted that power away] the ‘change’ is completed upon compliance with the notice requirement and the new rate has the same force as any other rate—it can be set aside only upon being found unlawful by the Commission. \* \* \*” (Emphasis supplied) (350 U. S. 332, 342)

**C. Under the decision in *Mobile* natural gas companies are as free to enter into rate contracts as they were before the passage of the Act.**

As further evidence that this Court was not construing the Act itself as limiting the rights of natural gas companies to enter into rate contracts or to make and change rates, we point to the following:

“\* \* \* Admittedly, the Act presumes a capacity in natural gas companies to make rates and contracts and to change them from time to time, but nowhere in the Act is either power defined. The obvious implication is that, except as specifically limited by the Act, [i.e., the requirement of notice by filing] the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act \* \* \*”. (350 U. S. 332, 343)

And again, to the same effect:

“\* \* \* The Act \* \* \* purports neither to grant nor to define the initial rate-setting powers of natural gas companies. \* \* \* The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act.” (350 U. S. 332, 341, 343)

Thus we submit that it is abundantly clear that all this Court decided in *Mobile* was that, subject only to

the requirement of notice by filing, natural gas companies are as free to enter into rate contracts as they were before the Act was adopted.

## II

It follows from this Court's decision in *Mobile* that whether or not a new rate schedule may be filed without the purchaser's consent depends not upon the Act but upon the terms of the contract or service agreement. If a service agreement provides for payment in accordance with schedules filed from time to time under §4(d), the Commission not only "may" but *must* accept such filings.

At the outset of its discussion of the filing provisions of the Act in *Mobile*, this Court, speaking of the special contract involved in that case, pointed out that "Absent the Act, a unilateral announcement of a change to a contract would of course be a nullity; \* \* \*".<sup>10</sup> After concluding that the Act did not limit the power of natural gas companies to enter into rate contracts, the Court concluded:

"\* \* \* it follows that the new schedule filed by United was a nullity insofar as it purported to change the rate set by its contract with Mobile and that the contract rate remained the only lawful rate." (350 U. S. 332, 347)

We submit that it is self evident that this Court reached that conclusion on the basis of the contract, and not on a "construction" of §§4(d) and (e). Indeed, the Court itself described its decision as "preserving the integrity of contracts" (350 U. S. 332, 344).

10. 350 U. S. 332, 339.

It follows inexorably that where, as here, a service agreement provides for payment at the "Seller's Rate Schedule—or any effective superseding rate schedules on file with the Federal Power Commission"—and it was conceded by Texas Gas and Southern Natural, and found by the Commission, that this means that the seller had contractual authority to file changes pursuant to §4(d) of the Act subject to review and modification by the Commission pursuant to §4(e)—the decision of this Court in *Mobile* requires that the "integrity" of that contract be preserved: United has the "power" to file, and the Commission is obligated to accept for filing and has "jurisdiction" to review, such changes in rate schedules as United may deem reasonable and proper.<sup>11</sup>

There can be no doubt that a contract to purchase gas at a rate to be determined from time to time, let us say by three arbitrators named in the contract, or on the basis of a published "index" or market quotation, would be valid and lawful "absent the Act", and would authorize rate changes in accordance with its terms. As there is nothing in the Act limiting the power of natural gas companies to make such contracts as they had the power to make before the Act (provided the notice and filing provisions are observed), it follows that a contract providing that the rates may be changed and filed pursuant to the express filing and reviewing provisions of the Act is equally valid. Nor does such a provision have the effect of "vesting" the Commission with any "arbitration function" or any other power not given to it by the Act,

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11. We are also at a loss to perceive the basis of the distinction sought to be drawn by the court below between a "consent" to such a filing, and a "consent" to the "exact level of rates". Section 4(d) expressly requires the filing of any change in rates, and an agreement to comply with that requirement would be entirely superfluous.

as erroneously assumed by the court below. The Commission merely accepts schedules which a natural gas company has the "power" to file, and deals with them in the same manner as it would any other schedules filed under §4(d) which a natural gas company has the power to file. Under the express decision of this Court in *Mobile*, since the "purported change" is here one which the company has the "power" to make under its contract, the "change" is completed upon the filing of notice under §4(d) "and the new rate has the same force as any other rate—it can be set aside only upon being found unlawful by the Commission."<sup>12</sup> The Commission's power to review that rate is vested in it by the Act, and not by the contract.

The rate provisions of the service agreements here in issue are valid and enforceable: United can file rate changes pursuant to §4(d) when it deems such action advisable without first obtaining the purchaser's consent to the "level of new rates."

### III

Service agreements providing for the terms and conditions of purchase at whatever rates are lawfully filed by the seller from time to time are widely used in regulated industries and are basically different in purpose and intent from the special fixed rate contracts involved in *Mobile* and *Sierra*.

The great majority of service agreements currently in effect between natural gas companies and their various wholesale customers provide that the gas shall be paid for in accordance with designated rate schedules as changed

12. 350 U. S. 332, 342.

and filed by the companies from time to time pursuant to §4(d) of the Act. Such flexible rate provisions are radically different in form, purpose, and substance, from contracts providing for sales at special low rates over a term of years such as those involved in *Mobile*, *Sierra* and *Tyler*. In the situations involved in those cases, as is apparent from the courts' opinions, without the special contracts there would have been no sales: Ideal Cement Company would not have established a plant in Mobile if it had not had the assurance of the low rate for ten years, and *Sierra* and *Tyler* would have purchased from competing suppliers if they had not been offered a fixed contract at competitive rates. Under such circumstances, if the selling company wants the business, it has to agree to a special low rate, to remain fixed for a specified term of years. And as this Court held in *Mobile* and *Sierra*, having obtained the business, the company is bound by its contract.

But it must be borne in mind that the contracts involved in those cases involved only a small portion of the selling company's gross sales, and a moment's reflection will indicate that if a company conducts all or most of its business on the basis of such contracts, a period of rising construction costs would immediately impair the financial ability of companies to meet demands for expanded service. For rates that might produce a "reasonable return" on investments made prior to 1946, when the *Mobile* and *Tyler* contracts were entered into, would not support the financial outlays necessary for the substantial expansion required in 1957.

When this is borne in mind in the light of the era of rapidly increasing costs during the past ten years, coupled as it was by an unprecedented expansion in the capacity

of natural gas companies,<sup>13</sup> it will readily be seen that some form of flexible price structure generally applicable to the majority of sales of natural gas was essential to the healthy growth of the industry.

The normal and customary method of maintaining the rate flexibility necessary for a proper performance of a regulated public service company's functions, including expansion to meet increased demands, is to offer service at whatever rates are currently "posted", i.e., on file from time to time under the supervision of the appropriate regulatory authority.<sup>14</sup> Under such arrangements, the interest of the purchaser in paying only a reasonable rate is protected by the filing and review provisions of the appropriate act: no change in rates can be made unless the Commission is given the opportunity to review and determine whether the new rate is within the "zone of reasonableness".

During the recent period of great expansion in the gas industry it became more and more apparent that this approach to "rate making" was both necessary and appropriate. The expansion of course was made necessary by the fact that demand exceeded supply. The primary concern of purchasers was to obtain gas, and the principal subject of bargaining between buyer and seller related to quantity and term of the contract. In the absence

13. The estimated cost of new facilities certificated for construction by the Commission between July 1, 1946 and June 30, 1947 aggregated \$5,660,554,000.

14. As we will be prepared to show in the appendix which we are preparing for a brief on the merits if certiorari is granted, this is the method widely in use for many years in retail transactions, not only in the gas industry but in the electric and telephone industries as well. And of course it is customary in many unregulated industries to contract for the purchase of goods at the seller's "list" or "posted" price at the time of delivery, or at prices determined by published price or cost indices, etc.

of such special circumstances as are illustrated by the *Mobile*, *Sierra* and *Tyler* cases, purchasers were generally satisfied to pay a "reasonable" price for the gas, and of course the filing, review and modification provisions of §§4(d) and (e), as supplemented by §5(a), furnish the machinery necessary for the accomplishment of that result.

Moreover, the Commission, by its Order No. 144 of 1948, issued primarily in order to obtain greater uniformity in rates and to simplify the task of regulation, directed gas companies to file their rates in tariff form wherever possible.

As a result of these circumstances, the records of the Commission show that as of today there are on file with the Commission some 1100 service agreements providing in one form or another for rates to be changed from time to time under the filing and review provisions of the Act, as against only 80 rate contracts.

It is also to be borne in mind that the great expansion of the past ten years has taken place on the assumption by all parties—pipe line companies, distributing companies, financial houses and purchasers of the companies' securities—that such service agreements permitted rate changes in accordance with their intended purpose. Yet the decision below if literally construed seems to nullify such agreements, thus raising the gravest doubts as to the status of some \$216,000,000 *per annum* currently being collected by natural gas companies subject to refund—over 90% of the aggregate net profit of the entire industry during each of the past two years. It also places in jeopardy current plans for expansion for which applications for certificates are now pending before the Commission, aggregating \$1,184,000,000 in estimated construction costs. Moreover, there is a serious question as to how

and whether natural gas companies can modify their methods of making and changing rates to comply with the construction placed upon the Act by the decision below, and yet at the same time provide a satisfactory base on which to finance future expansion.

For if, as the decision below seems to hold, the only way in which a rate contained in a rate schedule to which a service agreement refers can be increased without the negotiation of a new agreement with each individual customer, is by a proceeding under §5(a), there will be no assurance that the company's rates can be kept at a level sufficient to produce a "reasonable return" on its investment. As this Court expressly pointed out in *Sierra*, in speaking of the Commission's powers in a §5(a) type of proceeding<sup>15</sup> to review a rate producing less than a fair return on investment:

"• • • while it may be that the Commission may not normally impose upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain. • • • In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory. • • •" (350 U. S. 348, 355)

It would seem to follow from this that if, as the Court below held, all rates embodied in service agreements are frozen until and unless the purchaser agrees to a specific increase, or the agreements are set aside under §5(a), the

15. I.e., §206(a) of the Federal Power Act, 49 Stat. 847, 16 U.S.C. §824 *et seq.*, which is the counterpart of §5(a) of the Act.

rates would remain static until pipe line companies were already in serious financial difficulties.

Moreover, it must be borne in mind that the procedure for setting aside contract rates under §5(a) is far more difficult, cumbersome and time consuming than the procedure for modifying under §4(e) new rates which the seller has the authority to file. Under the latter, the issue is whether the new rate is "within the zone of reasonableness". But, as we have just seen, in a §5(a) proceeding to set aside a rate embodied in a contract, it is first necessary for the Commission to determine that the rate is so low as to adversely affect the public interest—a question involving the consideration of many economic problems besides "rate of return". After having made that determination, the Commission must then proceed to determine and fix a new and "reasonable" rate.

We respectfully submit that this Court should review a decision of a court of appeals which seems to bring about so fundamental and drastic a change in the regulatory provisions of the Act, as they have hitherto been construed and understood.

### CONCLUSION

**The petitions for certiorari should be granted.**

Respectfully submitted,

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December 31, 1957.

## **Certificate of Service**

I, WILLIAM C. CHANLER, attorney for *Amici Curiae*, and a member of the Bar of the Supreme Court of the United States, do hereby certify that I have served, upon the Solicitor General of the United States, an attorney of record for the Federal Power Commission and counsel of record for each other party, a copy of the foregoing motion for leave to file a brief *amici curiae* in support of petitions for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit, and a copy of such brief, by depositing true and correct copies thereof in the United States Mail, first class airmail postage prepaid (except as indicated by \* in which case first class postage prepaid was used), on December 31, 1957, addressed as follows:

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these being the names and post office addresses for such service as appears to me from the briefs in this cause in the court below and from drafts of the petitions for certiorari herein.

WILLIAM C. CHANLER

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OCTOBER TERM, 1958.

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No. 25

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FEDERAL POWER COMMISSION, *et al.*,  
*Petitioners,*

*v.*

MEMPHIS LIGHT, GAS AND WATER DIVISION, *et al.*,  
*Respondents.*

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**Motion of Long Island Lighting Company for Leave  
to File Brief *Amicus Curiae* in Support of Petitioners  
and Brief *Amicus Curiae* in Support of Petitioners**

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1958

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No. 25

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FEDERAL POWER COMMISSION, *et al.*,  
*Petitioners,*

*v.*

MEMPHIS LIGHT, GAS AND WATER DIVISION, *et al.*,  
*Respondents.*

---

**Motion of Long Island Lighting Company for Leave  
to File Brief *Amicus Curiae* in Support  
of Petitioners**

Long Island Lighting Company, pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States, respectfully moves for leave to file the brief *amicus curiae* annexed hereto in support of the position of the petitioners.

Consent to the filing of said brief was denied by respondents.

The interest of Long Island derives from the following facts. Long Island serves gas to 303,671 customers in Nassau and Suffolk Counties and the 5th Ward of Queens County in the State of New York. The population in the territory served by Long Island is growing rapidly, and the requirements of the Company's consumers for additional supplies of gas are substantial. At the present time almost all of the gas furnished by Long Island to its consumers is straight natural gas purchased

from Transcontinental Gas Pipe Line Corporation and Tennessee Gas Transmission Company, or is gas catalytically reformed from such natural gas. Long Island urgently requires additional substantial volumes in the immediately succeeding heating seasons.

The decision of the Court of Appeals raises such doubts as to the ability of pipe lines to secure warranted rate increases, that the additional risks resulting from that decision are bound to increase the cost of attracting the necessary additional capital. Such costs are an important component of the pipe lines' cost of rendering service, all of which is borne by the pipe lines' customers, including Long Island, and by the consumers who receive service from them.

Long Island believes that its participation as *amicus curiae* would be of assistance to this Court because Long Island is a gas (and electric) distribution company with no affiliation whatever with any pipe line company. Since one of the basic issues herein is the interpretation of service agreements similar to those which Long Island has signed with its two pipe line suppliers, the settled understanding of Long Island with respect to such interpretation may be of assistance to the Court.

Respectfully submitted,

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July 31, 1958.

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*Respondents.*

---

**BRIEF OF LONG ISLAND LIGHTING COMPANY,  
AMICUS CURIAE, IN SUPPORT OF PETITIONERS**

**Interest of Amicus Curiae**

The interest of Long Island in this cause is set forth in its motion to which this brief is annexed.

**Summary of Argument**

1. The service agreements involved in this cause, typical of those used in the pipe line industry, do not encompass a meeting of minds as to the specific price to be charged for the entire term of the agreements. Consequently, the *Mobile* decision\* holding that a seller cannot use Section 4 of the Natural Gas Act to escape his bad bargain, is no barrier to the Section 4 filing.

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\* *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332 (1956).

2. The uniformity of the price clauses in the service agreements shows that the parties do not understand that they are bargaining for individual prices; and this inference may also be drawn from the fact that the nature of the gas pipe line industry is such that price flexibility, albeit subject to Commission approval, is needed:

3. The Court of Appeals erroneously thought the buyers had consented to the "act of filing" new rates under Section 4, whereas in fact they had agreed to the use of the filed tariff procedure to determine price throughout the life of the agreements.

### Argument

1. Sections 4(c) and (d) of the Natural Gas Act provide two different methods for establishing rates: The buyer and the seller may negotiate a price and embody it in a contract, or the seller may file a schedule of its charges. Thus, Section 4(c) requires that there be kept on file with the Commission "schedules showing all rates and charges \* \* \* together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." Section 4(d) forbids any change "in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto" without appropriate notice to the Commission.

The issue in this case may be stated as whether the prices at which gas is to be sold pursuant to typical service agreements such as those here involved, is being sold at prices controlled by contractual provisions or at prices determined by tariff schedules.

The setting of this case is the decision two years ago by this Court in *Mobile* and in *FPC v. Sierra Pacific Power Co.*, 350 U. S. 348 (1956). As we read those decisions, they

stand for the simple proposition that when the buyer and seller have made a deliberate bargain as to price, the seller is bound by his contract and has no right to escape an unfavorable bargain merely by filing a new rate under Section 4. He is left to such remedies as Section 5 may afford.

As the Court pointed out in *Mobile*, there are situations wherein a pipe line company feels obliged to make a long-term agreement as to price, because of a "substantial investment in capacity and facilities for the service of a particular distributor" (350 U. S. at 339). But when the situation is not unusual, as when no special costs must be incurred to render service to a particular customer, there is no particular need for such an arrangement. Under such circumstances, the relationship between the pipe line and its customer is not individualized.

That the Court in *Mobile* was referring only to those situations where special individualized arrangements were thought by the parties to require individualized treatment, is evident from the recurrent phrases at pages 338 and 339 of the decision. The Court stated that the Act "evinces no purpose to abrogate private rate contracts as such". The Court referred to "rates to particular customers" being "set by individual contracts", in contrast to the Interstate Commerce Act which precludes "private rate agreements". The Court referred to "substantial investment in capacity and facilities for the service of a particular distributor", creating a need for "individualized arrangements between natural gas companies and distributors."

Thus the *Mobile* decision covers those situations in which the pipe line and its customer reached a meeting of the minds as to the price at which the gas would be sold during the life of the contract, and made a "private

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rate contract", an "individual contract", an "individualized arrangement" with respect to price. The holding of the Court is simply that in those circumstances the seller is bound by his special price arrangement and may not use Section 4 to avoid an onerous bargain.

But in the instant case, as in the typical "service agreement" situation in which a distributing company executes the service agreement to enable the pipe line to do its financing, there is no bargaining whatever for an individualized price. The only "individualized" arrangements relate to point of delivery and volume. The question of price is relegated by the parties to the filed tariff procedures.

The most that can be said for the price clause in the typical service agreement (such as those here involved) is that it incorporates by reference the price schedules provided in the then effective tariff; but a fair reading of these price clauses cannot reasonably lead to the inference that the parties intended the then current price to prevail over the entire life of the service agreement (typically 20 years). Such a construction is inconsistent with the plain meaning of the words of the clause which imports by reference not only the then filed tariff schedule but also "any effective superseding rate schedules".

The Court in *Mobile* (at p. 343) distinguished between the two types of rate-fixing procedure. It stated that "except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act: to establish *ex parte*, and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with the particular customer." We submit that the typical service agreement, such as that involved herein, is plainly

within the former category, as the parties contemplated that the rates would be found by reference to the filed tariff effective from time to time, rather than within the latter category wherein a specific price is "agreed upon with a particular customer" subject to "change only by mutual agreement."

We submit, therefore, that the situation in *Mobile* was drastically different from that involved in this case. In *Mobile* the Court refused to let a seller escape from his individualized bargain by using Section 4, the Court holding that Section 4 is a shield for the distribution company but not a sword in the hands of the pipe line. In *Memphis*, and in the typical service agreement situation, there was no meeting of the minds of the parties as to what the price would be over the term of the service agreement, no individualized arrangements, no private rate agreement, and, consequently, the pipe line company cannot be said to have bargained away its right to have its rates fixed under Section 4. See *Hostetter v. Park*, 137 U. S. 30, 40 (1890).

2. Furthermore, any different interpretation of the service agreements would be inconsistent with the plain facts of life in the gas business. The distribution company seeking an additional supply of gas understands that under the Commission's rules it will have to sign a service agreement which provides that the rate will be the filed tariff of the pipe line or any effective superseding tariff. No "individualized arrangements" as to rates are made. Indeed, the very uniformity of the rate clauses in the service agreements belies any argument that individualized rate treatment was intended by the parties.

Moreover, the nature of the public utility business is such that a company with many customers, increasing demands for service, and rising costs requires the degree of price flexibility which we believe these service agreements provide (but which the opinion below would deny). The stockholders of a public utility company give up the opportunity of reaping unregulated profits and expect in exchange the protection of rate increases if required by changed costs. Thus where there is fluidity in sales volumes and in costs, the public utility, if it is to be viable, must have the right to obtain necessary price increases concomitant with its liability to price reductions through the regulatory process. It would be extraordinary if a public utility company undertaking to serve the growing demands of its customers (or at least some of them) in a situation where its costs are rapidly rising, would agree to anything less.

There are situations where an individualized arrangement, calling for a long-term and generally a special low price,\* will make sense. For example, where a factory is to be constructed in a locality, designed to use large quantities of gas, if the fuel costs of the factory are an important factor in its competitive situation, the entire transaction may turn on securing a fixed long term price arrangement. That was the precise situation in *Mobile* (See 350 U. S. at 336). Again, the utility may consider it to be in its interests to make a special long term price

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\* The Court of Appeals for the Fourth Circuit emphasized that in the *Mobile*-type situation, there are "unusually low rates which the utilities have set up to serve their own interests." *South Carolina Generating Co. v. FPC*, 249 F. 2d 755, 762 (1957), cert. denied, 356 U. S. 912 (1958). That court said that in *Mobile* and *Sierra* "The Supreme Court was dealing with rates, too low to permit an adequate return according to accepted standards, which had been adopted to serve the interest of the producing utilities \* \* \*" (*ibid* at 761).

arrangement "to forestall the potential competition" of another possible supplier; that was the situation in the *Sierra* case (See 350 U. S. at 352). Or the utility may agree to a special low rate for a term of years, to match the competition of others and make it possible for a franchise to be renewed; that was *Tyler Gas Service Co. v. FPC*, 247 F. 2d 590 (D.C. Cir. 1957), *cert. denied*, 355 U. S. 895 (1958). But where there are many customers, a rising demand situation, and a marked pattern of increasing costs, the nature of the utility company is such that if it is to be subject to rate reductions when its profits are too high, it must have the right to obtain rate increases as well. The right (as in Section 5 of the Natural Gas Act) to request the regulatory body *sua sponte* to hold a hearing to determine whether rates are "so low as to conflict with the public interest" (350 U. S. at 345), may be adequate relief when the parties deliberately erect a structure based on a fixed long-term price, but for the general business of a regulated utility it is not an adequate substitute.

We submit, therefore, that the nature of the industry is such that (except in special situations) it may be expected to enter into long term service commitments in a rapidly changing situation only if the price arrangements include its right to apply for rate increases without obtaining the buyer's consent.

We urge that the price provisions in these service agreements should be interpreted to give effect to this underlying requirement of the industry.

3. The Court below appears to have reasoned from the major premise that every contract for the sale of goods must specify the price at which the commodity is to be sold, and the minor premise that here the buyer and seller have made an arrangement called a "contract" which in-

cluded a point of reference as to price. The conclusion is then drawn that the parties to these service agreements have agreed on the price for the gas over the terms of the service agreements. On this foundation the Court below concluded that the *Mobile* decision is a barrier to a filing by the seller under Section 4.

The trouble with this reasoning is with the underlying premises. Although these service agreements many times are called "contracts", they are not contracts in the ordinary sense of the term. As we have urged, the parties to these agreements do not understand that they are fixing a price for the term of the arrangement. They are simply making long term arrangements for gas supply in specified quantities, which arrangements are necessary from the seller's viewpoint to secure financing for the expansion of the pipe line and necessary from the buyer's standpoint to warrant making supply commitments to the public which it serves.

But there being no explicit understanding as to the specific price to be charged over the period of the service agreement, this lack cannot be supplied from the name of the instrument which buyer and seller execute. It is possible that a result of the fact that there is no explicit understanding as to particular price is that there is no enforceable contract between the parties; but that is a question which is not before the Court.\* Of course, if

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\* If that issue should ever be litigated, we would expect that the courts would give substantial weight to the economic requirements of the industry, and to the business practices resulting therefrom. Furthermore, we do not have a situation where the price provision of the purported contract is whatever amount the seller chooses to charge; under the service agreements, the price is to be whatever amount the Federal Power Commission permits to be charged under a statutory standard. Moreover, the system whereby the parties have been able to arrange for continuity of supply and regularity of delivery while leaving price matters to the filed tariff procedure, has been workable.

there is no enforceable contract there is no contractual inhibition to the filing of the new tariff under Section 4, and the decision below cannot stand.

The question here is whether the parties did in fact negotiate a price intended to last the life of the service arrangement, and that question may not be answered merely by reference to the fact that the instrument is called an "agreement" or a "contract".

The Court below started with the unproved proposition that the service agreement was intended to fix the prices for the duration of the agreement, and stated the issue as "whether the contract clause . . . provides the 'consent' necessary to give the Federal Power Commission jurisdiction to review under Section 4(e) of the Act *United's* new schedule filed under Section 4(d)." The Court interpreted the Commission's decision to mean that the buyers had consented to the "act of filing" the new rates, and concluded that the Commission's jurisdiction did not exist because jurisdiction cannot be conferred by private contract. We submit that a proper interpretation of the service agreement, and of the Commission's decision, is not that the buyer had consented to the "act of filing" but rather that the buyer had agreed to pay whatever price would be determined as a result of the normal Section 4 rate-making procedures which the parties had contemplated. We do not have a case where the parties had specified a price intended to last for 20 years, but had included a consent to the "act of filing" new rates. We have instead a case where the parties have not agreed as to the specific price to be charged for the duration of the agreement, but have agreed only as to the machinery to be used to ascertain the price. The buyer did not consent to the "act of filing" but consented to the incorporation by reference of a document subject to change (the rate schedule) as the same might from time to time effectively be changed.

As we understand the decision below, it would not be possible for a pipe line company to have an agreement with distribution companies pursuant to which the latter agreed to purchase and the former agreed to sell specified quantities of gas for a fixed term of years, at prices which would be governed solely by the rate-making procedures of Section 4 of the Act. Surely the service agreements here involved intended that result. But there is nothing in the *Mobile* decision which precludes such an arrangement, for as we have shown, *Mobile* is applicable only in those situations where the parties intended to fix a particular price for the entire service to be performed. The decision below, therefore, was incorrect.

### CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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July 31, 1958.



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IN THE

**Supreme Court of the United States** *CHIEF CLERK* FEY, Clerk

OCTOBER TERM, 1957

No. ~~100~~ 1 26

**TEXAS GAS TRANSMISSION CORPORATION AND  
SOUTHERN NATURAL GAS COMPANY,**

*Petitioners,*

*v.*

**MEMPHIS LIGHT, GAS AND WATER DIVISION, CITY  
OF MEMPHIS, TENNESSEE, AND MISSISSIPPI  
VALLEY GAS COMPANY,**

*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT.**

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December 31, 1957.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957.

No. \_\_\_\_\_

TEXAS GAS TRANSMISSION CORPORATION and  
SOUTHERN NATURAL GAS COMPANY,  
Petitioners,  
v.

MEMPHIS LIGHT, GAS AND WATER DIVISION, CITY OF  
MEMPHIS, TENNESSEE, and MISSISSIPPI  
VALLEY GAS COMPANY,  
Respondents.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Texas Gas Transmission Corporation (Texas Gas) and Southern Natural Gas Company (Southern) pray that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review a judgment of that court reversing an order of the Federal Power Commission (Commission). The Commission's order denied motions of the respondents herein to reject increased rates filed by United Gas Pipe Line Company (United) under the Natural Gas Act,\* and to prohibit such rates from becoming effective.

Petitions for writs of certiorari are also being filed by the Commission and by United.

\* Act of June 21, 1938 (52 Stat. 821-833), as amended by Act of February 7, 1942 (56 Stat. 83-84), July 25, 1947 (61 Stat. 459), and March 27, 1954 (68 Stat. 36); 15 U. S. C. §§717-717w.

### **Opinions Below.**

The opinion of the Court of Appeals (Appendix A, *infra*) has not been reported. The opinion and orders of the Commission (R. 224-237 and 245-247) appear at 16 F. P. C. 19 and 15 P. U. R. 3rd 279.

### **Jurisdiction.**

The judgment of the Court of Appeals is dated and was entered on November 21, 1957 (Appendix A, *infra*, p. 11a).

The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. §1254(1), and Section 19(b) of the Natural Gas Act.

### **Question Presented.**

Under the Natural Gas Act, as interpreted in *United Gas Pipeline Company v. Mobile Gas Service Corporation*, 350 U. S. 332, has a natural-gas company power to file under §4(d) of the Act, and has the Commission jurisdiction to receive under that section, new schedules changing rates, where the consent of the purchasers to the specific new rates has not been obtained and where the company sells gas under service agreements which provide that it may so change its rates?

### **Statute Involved.**

The statute involved is the Natural Gas Act.\* Relevant portions of that Act are printed in Appendix B, *infra*.

### **Statement of Case.**

We refer to and join in the detailed statement of the case in the Commission's Petition. We state below only so

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\* For complete citation see Table of Statutes and footnote, p. 1.

much of the case as is necessary to an understanding of the present Petition.

United, a natural-gas pipeline company, has long-term service agreements with various customers, including the petitioners and the respondent Mississippi Valley Gas Company. As stated by the court below, each of these service agreements contains the following paragraph or its equivalent (App. A, p. 5a):\*

"All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule [here is inserted the appropriate rate schedule designation], or any effective superseding rate schedules, on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached thereto and filed with the Federal Power Commission which are by reference made a part hereof."

The understanding and intent of the contracting parties with reference to the foregoing language was to grant United the power to make changes in rates pursuant to §4(d) of the Act, without waiver, however, of the right of the purchasers to oppose such changes in proceedings before the Commission for the purpose of testing the reasonableness and justness thereof (App. A, pp. 5a, 6a).

Pursuant to the foregoing provision, United filed with the Commission schedules of increased rates under §4(d) of the Natural Gas Act. The Commission thereafter entered upon a hearing under §§4, 5 and 15 of the Act. The level of the new rates was contested at this hearing by various intervenors, including the petitioners and

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\* See in this connection, p. 8, Fn. 8, of the Commission's Petition.

respondents. No question was raised as to the Commission's jurisdiction to review them. After this Court's *Mobile* decision, however, the respondents moved to have the Commission reject the new rate schedules on the ground that the Commission had no jurisdiction to review them. This motion was denied. The respondents then brought the case before the Court of Appeals for the District of Columbia Circuit on a petition for review pursuant to §19(b) of the Act.

The present petitioners, who intervened in the Court of Appeals in support of the Commission's jurisdiction, are natural-gas pipeline companies who are parties to agreements here involved and who have many long-term service agreements with others containing price clauses similar to those in United's service agreements.

## REASONS FOR ALLOWANCE OF WRIT

### A. Importance of Question Presented.

In the *Mobile* case this Court granted certiorari "because of the importance of this question in the administration of the Natural Gas Act" (350 U. S. at 337). The question here involved is of vastly greater importance in the administration of the Act because it involves the regulatory jurisdiction of the Commission and the interpretation and legal operation, not of a unique and specific contract between two parties as in *Mobile*, but the interpretation and legal operation of service agreements used throughout the industry pursuant to the Commission's Order No. 144.\*

The decision of the court below, which is in conflict with the *Mobile* case, effectively precludes virtually the entire

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\* 13 Fed. Reg. 6371 *et. seq.* (1948).

natural-gas pipeline industry from filing changed rate schedules under §4(d) of the Act, and destroys almost completely the method of regulating rates which has been followed by the Commission since 1948.

All natural-gas pipeline companies which make sales subject to the Act are required to do so under rate tariffs on file with the Commission and in almost all instances in accordance with forms of service agreements which comprise parts of such tariffs. The tariff requirements have been effective since December 1, 1948, and were promulgated by the Commission's Order No. 144.

These regulations prescribe the tariff form and require that the executed service agreements specify the price by reference to separate rate schedules which are contained in the filed tariff. Only in special instances may contracts be stated in a form similar to that in the *Mobile* case.\*

The tariff rules provide that "only the rates and charges to be used in current billing shall be included in rate schedules," thus precluding the specifying of future rates in filed rate schedules (§154.38[d]). Moreover, no formula providing for automatic rate increases upon increases in cost can be included since the same section provides that nothing shall be contained in the tariff which, in any way, purports to change a rate specified in a rate schedule. This section, however, also says that a service agreement may provide for proposals by a natural-gas company for changes in rate, but that no such provision may effectuate a change "except in the manner provided in section 4 of the Natural Gas Act, as amended, and the regulations in this part."

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\* §§154.34, 154.38, 154.40, 154.52, 154.82 and 154.85 (App. C *infra*). As of December 1957 there were 1100 executed service agreements on file with the Commission and only 80 special contracts in other than service agreement form.

Operating under these tariff rules, pipeline companies generally have sold gas under the prescribed rate schedule and service agreement arrangement and have changed their rates specified in schedules by filing superseding schedules, which the Commission consistently has accepted under Section 4(d) and has suspended and reviewed under Section 4(e).\*

If the decision of the Court of Appeals is not reversed, pipeline companies which have conformed to the tariff rate system set up by the Commission—as all of them have in major part—would have no right to file changed rates under §4(d) of the Act. The only relief available to a pipeline seller would be either (a) to negotiate a change with its customers, in a situation where the seller is without any negotiating position or (b) to convince the Commission that it should initiate a rate proceeding under §5(a), which it is not compelled to initiate at the request of a natural-gas company.\*\* Neither is a workable solution.

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\* See *Colorado Interstate Gas Corporation*, 8 F. P. C. 313, 82 P. U. R. NS 350 (1949); *The Ohio Fuel Gas Company*, 10 F. P. C. 145 (1951); *Atlantic Seaboard Corporation, et al.*, 11 F. P. C. 43, 94 P. U. R. NS 235 (1952); *Transcontinental Gas Pipe Line Corporation*, 11 F. P. C. 94, 94 P. U. R. NS 333 (1952); *Northern Natural Gas Company*, 11 F. P. C. 123, 95 P. U. R. NS 289 (1952); *Northern Natural Gas Company*, 11 F. P. C. 278, 95 P. U. R. NS 143 (1952); *Mississippi River Fuel Corporation*, 11 F. P. C. 288, 95 P. U. R. NS 435 (1952); *Texas Eastern Transmission Corporation*, 11 F. P. C. 416 (1952); *United Fuel Gas Company*, 100 P. U. R. NS 405 (1953); *Panhandle Eastern Pipe Line Co., et al.*, 3 P. U. R. 3d 396 (1954); *The Ohio Fuel Gas Company*, 100 P. U. R. NS 159 (1954); *Northern Natural Gas Company*, 9 P. U. R. 3d 8 (1955).

\*\* See *Federal Power Commission v. Sierra Pacific Power Company*, 351 U. S. 946, 954-955, where it is held that the consideration which should influence the Commission to initiate a rate proceeding is primarily if not solely the public interest, with no effect being given to the interest of seeing that capital invested receives a fair return, an important consideration to be weighed by prudent management.

Renegotiation is impracticable because of the large number of negotiations and parties which would be involved, and because of the Act's prohibition against unreasonable differences in rates between localities and between classes of service (Section 4[b]). Clearly, the many renegotiations which would be required could not be expected to meet the Act's standard of uniformity, even if it were practicable to obtain the agreement of so many parties to new rates, which it is not.

An example of the number of the separate renegotiations which would be required is presented by United's situation. United makes jurisdictional sales of gas to 9 different customers. Four of these are pipeline companies. These pipelines, in turn, make many sales subject to the Commission's jurisdiction,\* and some of their purchasers, in turn, are pipeline companies which make sales for resale. Before a purchasing pipeline company could reasonably be expected to agree to pay an increased rate to its pipeline supplier, it, of course, would have to obtain agreement of its customers to its charging higher rates so as to pass on the consequent increased costs. A system-wide rate increase by United, if the Court of Appeals' requirement for renegotiated rates were to be followed, would involve over 400 price renegotiations. In view of the increased costs already incurred which are reflected in data which was before the Commission in this case, all these negotiations could not possibly be concluded in time to avoid financial catastrophe to United.

The alternative to renegotiation—a Commission-initiated proceeding under §5(a)—at best would be long and drawn-out, with relief, if granted, coming only after delays which could leave the companies involved economic cripples or

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\* Southern makes 95 such sales, Texas Gas 59, and most other pipeline companies, similarly, make numerous jurisdictional sales.

bankrupts. In addition, because of the impact upon all companies of rising costs in recent years, the Commission would be without manpower to conduct simultaneously the number of rate hearings under §5(a) which would be required. Since no relief would be available under §5(a) until the end of the hearing, the resulting delay would work to the serious and often catastrophic detriment of the companies and the public which they serve.

If the decision of the Court below is to be followed, it probably will require the dismissal of almost all pending pipeline company rate increases. Thirty-four pipeline companies have rate increases in effect subject to refunds amounting to \$175,000,000 annually. As of December 31, 1957, they had collected over \$240,000,000 subject to refund, as is indicated in the Commission's Petition for Certiorari. The relative importance of the dismissal of rate increases of this magnitude is indicated by comparison of these sums with the \$342,438,610 of annual net gas operating revenues of all major interstate pipeline companies.\*

For the reasons stated, the decision of the court below in effect reads §§4(d) and (e) out of the Act so far as pipeline company rates are concerned. The prevalent arrangement under which the buyer gives contractual assent to rate changes under §4(d) and the Commission permits such changes to be filed subject to its review, has contributed greatly to the public welfare. It gives protection to the consumer by Commission review, while at the same time it permits pipeline companies to recoup increasing costs without unreasonable regulatory lag. Thus, while the public has been protected from too high rates, the industry has been enabled to maintain a healthy condition, keeping pace with constantly increasing consumer gas requirements.

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\* Natural gas pipeline companies operating revenues and income—September, 1957, F. P. C. Release No. 9556.

and contributing to the general prosperity of the nation through large purchases of materials.

If rate relief can be obtained only under §5(a), the pipeline companies will not be able to reflect in rates costs already incurred or incurred during the three to five years which experience has shown is required to conclude such a proceeding. Under such an arrangement, the sources of the large amounts of debt and equity capital needed to finance pipeline expansions will dry up, with the result that the ability of the industry to satisfy the requirements of its growing markets will come to a halt.\*

Not only will inadequate supplies of new gas be available to distributing companies and consumers, but the pipelines will not be able for long to continue to deliver the quantities of gas they are currently supplying. This situation arises because the current field prices of gas are substantially higher than the average purchased gas costs of most pipeline companies today. If pipelines are unable to pass on increased costs without undue delay, they will not be able to purchase increased gas supplies at prices higher than their current average gas costs. Since new supplies are not available at such prices and since previously attached reserves are constantly being depleted, the flow of gas through the nation's pipelines will continually diminish. Thus the enormous investment in local distribution facilities and the still larger investment of the public in gas appliances will be endangered.

Such a failing of the interstate gas market would mean lowering of the level of gas exploration and development.

\* For example, as a result of the decision below, Colorado Interstate Gas Company has postponed a \$182,000,000 expansion program (Wall Street Journal, December 23, 1957, p. 12). Because of expected deferment of delivery of 400,000 tons of steel for a single project, Republic Steel is closing down an entire plant, which would have been devoted to its 40,000 ton share of that delivery.

activities, with a resulting diminution of the nation's available resources of this important fuel.

Plainly, review of a decision which (i) effectively reads §§4(d) and (e) out of the Act so far as pipeline company rates are concerned, (ii) involves a distortion of the *Mobile* doctrine, and (iii) completely changes the Commission's rate regulatory methods followed since 1948, presents a question of grave public importance in the interpretation and administration of the Act which should be decided by this Court.

**B. Erroneous Construction of Service Agreements; Misapplication of *Mobile*; and Erroneous Interpretation of Act.**

The decision of the Court of Appeals was erroneous; and the decision of the Commission was correct.

The opinion of the Court of Appeals misinterprets the service agreements.

It misinterprets the *Mobile* case, asserting it to be applicable in a case where the facts are materially different.

It misinterprets the Act with respect to the jurisdiction of the Commission over the making and amending of rate schedules by natural-gas companies.

*Erroneous Construction of Service Agreements:* The form of service agreements here involved is a form fair and just to sellers, buyers and ultimate consumers; a form accepted and executed throughout the industry; a form that prevents unjust discrimination as between customers and as between consumers; and a form that promotes efficient public service by enabling pipeline companies to make long-term commitments and yet retain the capacity to finance their operations by allowing their income to keep

pace with the costs of procurement and distribution of gas in times of inflation and variable world conditions.

The decision of the Court of Appeals, if unreversed, will defeat most of these purposes.

The only provision of these service agreements here involved is the provision as to price. That provision is in part as follows:

**"All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedules [here is inserted the appropriate rate schedule designation], or any effective superseding rate schedules, on file with the Federal Power Commission."**

The decision by the Court of Appeals deletes the italicized words and makes them totally inoperative.

The purpose for which this price term is included in the service agreements is to determine the price or prices which the buyer promises to pay and in return for which the seller promises to supply the gas.

This provision has nothing to do with the "jurisdiction" of the Commission. It in no way limits the power of the Commission to suspend or to declare invalid any rate schedule which may be filed. The powers of the Commission (its "jurisdiction") are determined by the Act.

A buyer may promise to pay a specific and unchangeable rate for a specific period (as in the *Mobile* case) or to pay a rate fixed by a specific rate schedule until it is superseded by another one, and thereafter to pay the superseding rate when it becomes effective under existing law (as in the present case).

The Commission understood the nature and meaning of the promises of the buyer and seller in this case. The Court of Appeals did not.

The Commission knew the reasons why the provisions of the price term in this case are necessary to the operation of the pipeline business and why they are consistent with the interests of buyers and consumers. The Court of Appeals did not.

The obvious and principal error committed by the Court of Appeals—the error around which all its other errors are clustered—is its holding that the words of the price term, instead of being a mere promise to pay in accordance with the seller's filed tariff rates, constitute an attempt to confer on the Commission a jurisdiction that it would not otherwise have. The court says (App. A, p. 5a):

"In the present case, the question is whether the contract clause quoted above provides the 'consent' necessary to give the Federal Power Commission jurisdiction to review under Section 4(e) of the Act United's new schedule filed under Section 4(d)."

In the next paragraph the court quotes the correct statement of the Commission without even noticing the vital difference between the two statements. The statement there quoted is this:

"\* \* \* it was the understanding and intent of the contracting parties \* \* \* to grant United the power to make changes in rates pursuant to section 4(d) of the Natural Gas Act, without waiver, however, of the right of the purchasers to oppose such changes in proceedings before the Commission for the purpose of testing the reasonableness and justness thereof."

Continuing, the court says:

"Correct though the Commission's statement of the parties' intent may be, it does not answer the question whether the Commission has jurisdiction to accept such a schedule for filing and to proceed under

Section 4(e) to review United's filing of a new rate, where the level of the new rate itself has not been previously agreed upon by the parties to the contract."

Thus, in the court's opinion, the interpretation of the price term is immaterial. Even though the reasonable meaning of the words and the actual intention of the parties in using them was to sell and to buy at a variable price to be determined in accordance with filed rate schedules as and when made effective as provided by law, their meaning and intention could not be enforced, the court seemed to think, because the changed rates constituted a change in the contract which the Commission was without jurisdiction to receive for filing.

But a change in the rates was not a change in the contract. When United, acting in accordance with the provisions of the Act, filed its new rate schedule in this case, it was neither "proposing" nor making, either unilaterally or otherwise, any changes in the price term of the service agreements as previously agreed upon by all parties. That depends, wholly and exclusively, upon the interpretation of the price term itself. It was changing the "price," as translated into dollars and cents, but not the "price term." The Commission well understood this difference. The Court of Appeals did not.

The court quotes the Commission as follows (App. A, p. 6a):

"United's proposal for increased rates in this proceeding does not constitute a prohibited unilateral change of a contract, for the contract language supplies the purchaser's assent to United's filing of a change in rates."

The Court of Appeals erroneously thought that a change in the rates in this case would operate as a change in the

terms of contract previously agreed upon, just as it would have done in the *Mobile* case (where the contract did not provide for price changes); and it held, with utter illogic, that even though the buyer had assented to the filing of a new schedule and had promised to pay at the rates fixed therein, such assent must be inoperative for the reason that it could not confer new jurisdiction on the Commission.

In this case it was the Court of Appeals, not United, that changed the contract. It has wiped out an express provision and turned the contract into one which binds the parties to sell and to buy at a single price for a term of years, instead of at a changeable price under changed conditions, to be fixed by a series of superseding rate schedules. In thus changing the terms of the contract, the Court of Appeals has not only made a new contract for the parties, it has also limited the powers of the Commission.

*Misapplication of Mobile:* The Court of Appeals misinterpreted and misapplied the *Mobile* case. The Court of Appeals was aware that the price term in these service agreements is different from that in the *Mobile* contract. Nevertheless, it held that the two cases were substantially alike, that the *Mobile* decision governed this case also, and that United's new rate schedules could not be accepted for filing because the new rate schedule in *Mobile* was held inoperative.

As we have already stated, the provisions of the two contracts are not alike. But one rule of law that is applicable to both of them alike is as follows: The service agreement here and the contract in *Mobile*, as assented to by the parties and reasonably interpreted, are binding on the parties, subject to review by the Commission. They are equally binding on both seller and buyer. The seller has no power to change the terms of the contract by his unilateral action; no more can the buyer force such a change

on the seller, increasing his burdens and compelling him to render the promised service at a lower price than that to which he was entitled by the terms of the agreement. The prices that must be paid, and that must be accepted, are the prices that have been agreed upon as expressed in the price term.

In the *Mobile* case, the seller promised to sell, and the buyer promised to pay for, all gas delivered at the specific rate of 10.7 cents per Mcf for the entire period of 10 years. There was no provision for changing the price. Therefore, a change in the price was necessarily a change in the price term. It was a change in the contract.

Throughout the opinion of this Court in the *Mobile* case, the denial of United's power to change is expressly limited to a change in the contract. Nowhere does the Court deny the power to change a rate if such a power is not prohibited by contract, or as here, if such a power is expressly conferred by the contract itself. The following are forms of statement used by this Court in the *Mobile* opinion:

The Court states "the question" to be as to the seller's power to "change the rate specified in the contract" (350 U. S. at 334).

The Court says (at page 337): "we hold that the Natural Gas Act does not give natural gas companies the right to change their rate contracts by their own unilateral action." Note the phrase "their rate contracts"; it is not the equivalent of "their rates irrespective of the contract."

The Court (at page 343-44) finds nothing in the Act "from which we can infer the right \* \* \* of natural gas companies unilaterally to change their contracts."

The Court expresses its concern for enforcement of agreements as made by the parties (at page 344): "By preserving the integrity of contracts, it [the Act] permits the stability of supply arrangements which all agree is essential

to the health of the natural gas industry." In the case now before this Court, it is the "integrity" of the service agreements, drawn within the restrictions of the Commission's rules, and freely assented to by the parties, which is at stake.

The Court says (at page 344): " . . . the distributor can hardly make such commitments if its supply contracts are subject to unilateral change . . . ." Neither can the seller make a long term commitment to supply gas if the buyer may repudiate an express provision for the filing of new rate schedules, subject to review by the Commission. "Integrity of contracts" is of bilateral application.

Finally, the Court says (at page 347): "From our conclusion that the Natural Gas Act gives a natural gas company no power to change its contracts unilaterally, it follows that the new schedule filed by United was a nullity insofar as it purported to change the rate set by its contract with Mobile and that the contract rate remained the only lawful rate." Since the contract specified the single rate of 10.7 cents per Mcf and contained no provision for changes by the seller, the latter had no power to "change the rate set by its contract," and "the contract rate remained the only lawful rate."

In the present case, the "contract rate," and "the only lawful rate," is the one fixed by the last rate schedule on file with the Commission, one that has been approved after proper review by the Commission as being reasonable and just and in accord with the public interest.

The opinion of the Court of Appeals, in its entirety, shows how grossly the court misunderstood both the Act and the opinion in the *Mobile* case. It is not concerned with the "integrity of contracts," but with the maintenance of the rate schedules that were on file at the date of contracting, in the teeth of an express agreement, similarly

interpreted by all parties, that later rate schedules should apply when filed with and approved by the Commission. It interpreted the *Mobile* decision so that, instead of maintaining the "integrity" of a contract (as this Court did in the *Mobile* case), it undermined the integrity of all service agreements which expressly provide for payment in accordance with superseding rate schedules when filed with and made effective by the Commission in accordance with the Act.

We quote from the opinion of the Court of Appeals only enough to show the extent of its misunderstanding (App. A, pp. 6a, 7a):

"The notice contemplated by Section 4(d) is notice of the fact that the contracting parties have reformed their contract: that the seller has offered, and the buyer has agreed to, a particular new price to be effective no less than thirty days after the Commission is notified of the change. 350 U. S. at 339-40. It is only at this point—after the parties have negotiated privately a new price term—that the Commission, under Section 4(d) and (e), in any way becomes involved with the rate changing process. Nothing in Section 4(e) gives the Commission authority to assist the parties in negotiating a new price term.

"Under the rule in *Mobile*, for the Commission to review rates under the more expeditious procedure of Section 4(e), the seller must bring to the Commission a negotiated agreement. And that agreement to the new rate must be as specific in its terms as was the previous contractual agreement to the rate schedule sought to be superseded." (Emphasis in original.)

According to the Court of Appeals, the parties have no power to make a contract to pay rates as fixed in an existing rate schedule or in superseding rate schedules, a contract

that would be perfectly valid at common law and in equity and that is entirely consistent with the Act and with the opinion in the *Mobile* case. There is absolutely nothing in the Act or in the *Mobile* opinion to justify this holding by the Court of Appeals. Parties are left to make their own contracts and are bound by them as made, so long as the Commission does not set them aside under the standards of the Act.

*Erroneous Interpretation of the Act:* The manner and extent to which the Court of Appeals misinterprets the service agreements and this Court's opinion in the *Mobile* case demonstrates that it misinterprets the Act in like degree. It limits the power of the contracting parties to make their own agreements in a manner not warranted by either the Act or by the *Mobile* opinion. In holding that the Commission had no "jurisdiction" to permit the filing of United's superseding rate schedules in this case, it deprives the Commission of jurisdiction conferred upon it by the Act and recognized by this Court in the *Mobile* case.

### C. Intra-circuit Conflict.

As recently as June and September of 1957 the Court of Appeals for the District of Columbia in two cases reached a conclusion directly contrary to the result reached below in this case. We refer to the two cases entitled *Cincinnati Gas & Electric Company v. Federal Power Commission*, 246 F. 2d 688 (1957) and 247 F. 2d 556 (1957), petition for certiorari filed December 5, 1957, Docket No. 642. The seller company in these cases was subject to the Natural Gas Act and sold gas under long-term contracts, usually twenty years. These contracts contained price provisions substantially similar to those in United's service agree-

ments (Record in 246 F. 2d 688 at pp. 5708-09). The seller filed revised schedules with the Commission changing the basis for computing demand charges, which affected the cost of gas to the purchaser. Several contract purchasers objected to the change.

From an order approving such changes, a petition for review was filed in the District Court of Appeals. That court found the petitioners to be not aggrieved persons and dismissed the petition.

One specification of aggrievement was that in approving the new rate schedule, the Commission had unlawfully changed the existing long-term contract between supplier and buyer "without the necessary finding that said agreements adversely affect the public interest under the Natural Gas Act". The court stated that it would discuss the merits of this contention, although in the court's view of the case such discussion was not necessary. Its view of the case is as follows (246 F. 2d at 693):

"The petitioners rely upon *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 1956, 350 U. S. 332, 76 S. Ct. 373, 100 L. Ed. 373, and *Federal Power Comm. v. Sierra Pacific Power Co.*, 1956, 350 U. S. 348, 76 S. Ct. 368, 100 L. Ed. 388, which hold, respectively, that the Natural Gas Act and the Federal Power Act do not give natural gas companies and power companies the right by their own unilateral action to change rates established by contract.

"These cases are readily distinguishable from this one, for here the service agreement expressly contemplates future filings and there has been no unilateral change in rates fixed by contract."

Clearly if the Court of Appeals had followed this earlier decision, which it did not even cite, we would not be here seeking review. While the change in the *Cincinnati Gas &*

*Electric* case was not a change in the unit price but in the method of computing the demand charge, it did affect the amount of money paid by the purchaser and is indistinguishable from the present case. There is nothing in the law which permits unilateral changes of demand provisions and bars unilateral changes of unit rates.

An intra-circuit conflict such as that between the *Cincinnati Gas & Electric* cases and the present case is alone a sufficient ground for granting certiorari.

*John Hancock Ins. Co. v. Bartels*, 308 U. S. 180, 181 (1939);

*Dickinson v. Petroleum Corp.*, 338 U. S. 507, 508 (1950).

It is probably unfair to say that there is a conflict among circuits. It is relevant to point out, however, that new rates filed pursuant to reserved power under clauses similar to that in the United contract here before the Court have been reviewed by the Commission under Section 4(e) and such action has been sanctioned by another circuit. See *State Corp. Commission of Kansas v. Federal Power Commission*, 206 F. 2d 690 (8th Cir. 1953), *cert. denied*, 346 U. S. 922, and see record before the court in that case, p. 7583, for contract provision similar to that of the United contracts.

**Conclusion.**

**For all the foregoing reasons it is respectfully submitted that the petition for a writ should issue as prayed.**

**Respectfully submitted,**

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**December 31, 1957.**

## APPENDIX A.

### Opinion.

## United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 13,666

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MEMPHIS LIGHT, GAS AND WATER DIVISION; CITY OF MEMPHIS,  
TENNESSEE; AND MISSISSIPPI VALLEY GAS COMPANY,  
*Petitioners,*

v.

FEDERAL POWER COMMISSION,  
*Respondent,*

UNITED GAS PIPE LINE COMPANY; TEXAS GAS TRANSMISSION  
CORPORATION; and SOUTHERN NATURAL GAS COMPANY,  
*Intervenors.*

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ON PETITION FOR REVIEW OF ORDERS OF THE  
FEDERAL POWER COMMISSION

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Decided November 21, 1957

Before BAZELON, WASHINGTON and BASTIAN, Circuit  
Judges.

WASHINGTON, *Circuit Judge*: This case concerns the interpretation to be given the Supreme Court's decision in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332 (1956). The chief question is whether the rule of that case applies where—as here—the controlling supply contracts pledge payment under designated rate schedules “or any effective superseding rate schedules.”

## I.

Petitioners seek review of an order of the Federal Power Commission denying their motions to reject new rate schedules filed by the intervenor United Gas Pipe Line Company (United). United sought to increase the prices at which it was obligated by contract to sell gas to the intervenors Texas Gas Transmission Corporation (Texas Gas) and Southern Natural Gas Company (Southern Natural), and also to petitioner Mississippi Valley Gas Company (Mississippi). Also denied by the Commission were petitioners' motions to prohibit the new rates from becoming effective and to require appropriate refunds by United.

Intervenor United is a "natural-gas company" within the meaning of the Natural Gas Act, 52 STAT. 821, 15 U. S. C. §717a (1952), whose sales are subject to the jurisdiction of the Federal Power Commission. Petitioner Memphis Light, Gas and Water Division is a gas distribution agency of petitioner City of Memphis, Tennessee. The interests of the City of Memphis and of the Division are identical; hereafter both will be referred to jointly as "Memphis." Memphis obtains all of its gas supply from intervenor Texas Gas. The latter, a pipeline company, in turn obtains a substantial part of its supply from United. Petitioner Mississippi is a gas distribution system. It obtains some of its supply by purchase directly from United. It also is supplied by Texas Gas and by Southern Natural. Southern Natural, like Texas Gas, obtains a substantial part of its supply from United.

Thus, United has direct seller-buyer relationships with Mississippi, Texas Gas and Southern Natural. United has no such relationship with Memphis, which buys only from Texas Gas. Texas Gas, a customer of United, has seller-buyer relationships with both Memphis and Mississippi. Southern Natural, also a customer of United, has a seller-buyer relationship with Mississippi only. The supply arrangements between the parties are governed by long-term service agreements (contracts).

On September 30, 1955, the Commission accepted United's new schedules for filing under Section 4(d) of the Natural Gas Act, 15 U.S.C. §717c(d) (1952). The level of these new rates had not been agreed to by United's contract customers. Acting under Section 4(e), the Federal Power Commission suspended the operation of the new schedule for non-industrial sales and ordered a hearing on the lawfulness of the new schedule. These hearings were held, with Memphis as an intervenor therein, but are not involved in the present review.

In February, 1956, while the Section 4(e) hearings were in progress, the Supreme Court announced its decision in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, *supra*, holding that a gas seller could not unilaterally increase its contract rates for gas. Petitioners thereupon filed with the Federal Power Commission motions to prohibit United's new rates from becoming effective on April 1, 1956,<sup>1</sup> to reject those increases, and to order appropriate refunds. Their position was that United's filing was a unilateral attempt to increase rates and that the Federal Power Commission had no jurisdiction to process such an application under Section 4(e), as construed in *Mobile*. See also *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U. S. 348 (1956). The Commission heard argument and on October 2, 1956, denied the motions in an opinion and order. Rehearing was denied on November 23, 1956. Petitioners now seek review of those orders.

## II.

At the outset the Federal Power Commission urges that the orders here under review are interlocutory and not presently subject to our scrutiny. Of the intervenors only United joins in this attack; it urges in addition that petitioners, as strangers to the contracts here involved,

<sup>1</sup> April 1, 1956, is five months after November 1, 1955. November 1, 1955, is thirty days after the new schedules were filed. See Natural Gas Act §4(d), (e), 15 U. S. C. 717c(d), (e) (1952).

are not "aggrieved" under Section 19(b) of the Act, 15 U.S.C. §717r(b) (1952).

The aggrievement issue is readily answered insofar as petitioner Mississippi is concerned. Mississippi is a party to three of the contracts here involved as a direct customer of United. And United is, in the proceeding here under review, seeking to increase the cost of gas to its direct contract purchaser Mississippi. As to Memphis the situation is somewhat different. Memphis is not a direct customer of United. Rather it purchases from Texas Gas. But the Federal Power Commission has already approved an agreement between Texas Gas and Memphis whereby Texas Gas' customers will reimburse it for any increase in gas cost as a result of the hearings now in progress. Docket No. G-2017, 14 F.P.C.—(1955); see F.P.C. orders at 20 Fed. Reg. 8088, 8977 (1955). Because of this F.P.C.-approved agreement, Memphis will feel the immediate impact of any increase awarded. This immediate impact is sufficient to give Memphis standing. See *City of Pittsburgh v. Federal Power Commission*, 99 U. S. App. D. C. 113, 237 F. 2d 741 (1956); *National Coal Ass'n v. Federal Power Commission*, 89 U. S. App. D. C. 135, 191 F. 2d 462 (1951). No further action of the Commission is necessary to make operative the increased cost to Memphis. Cf. *California Oregon Power Co. v. Federal Power Commission*, 99 U. S. App. D. C. 263, 239 F. 2d 426 (1956); *Cincinnati Gas & Electric Co. v. Federal Power Commission*,—U. S. App. D. C. —, 246 F. 2d 688 (1957).

United's and the Commission's contentions that the orders here under review are interlocutory and that therefore we have no jurisdiction are without merit. Suffice it to say that this case is presented to us in substantially the same posture in which the *Mobile* case was presented to the Third Circuit and to the Supreme Court. See *Mobile Gas Service Corp. v. Federal Power Commission*, 215 F. 2d 883, 885 (3d Cir. 1954), aff'd sub nom. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332 (1956); see also *Tyler Gas Co. v. Federal Power Commission*,—U. S. App. D. C.—,—F. 2d—(decided August 1, 1957).

## III.

This case is, in every pertinent aspect save one, a close copy of *Mobile*. That single aspect is the presence in the contracts here involved of the following provision:<sup>2</sup>

"All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule [here is inserted the appropriate rate schedule designation], or any effective superseding rate schedules, on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached thereto and filed with the Federal Power Commission which are by reference made a part hereof." (Emphasis added.)

In *Mobile*, the Court stated at the outset that—

"The question presented in this case is whether under the Natural Gas Act, 52 Stat. 821, 15 U. S. C. §717 *et seq.*, a regulated natural gas company furnishing gas to a distributing company under a long-term contract may, without the consent of the distributing company, change the rate specified in the contract simply by filing a new rate schedule with the Federal Power Commission." 350 U. S. at 333-34.

The Supreme Court answered in the negative. In the present case, the question is whether the contract clause quoted above provides the "consent" necessary to give the Federal Power Commission jurisdiction to review under Section 4(e) of the Act United's new schedule filed under Section 4(d).

The Commission found that the phrase "any effective superseding rate schedules" did provide the consent required by *Mobile* and

<sup>2</sup> There is some dispute among the parties as to whether three of the contracts contain the quoted contract provision. For present purposes we will accept the Commission's representation in its brief that all of the contracts contain the disputed clause or its equivalent.

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“that it was the understanding and intent of the contracting parties [as expressed in the above-quoted contract clause] to grant United the power to make changes in rates pursuant to section 4(d) of the Natural Gas Act, without waiver, however, of the right of the purchasers to oppose such changes in proceedings before the Commission for the purpose of testing the reasonableness and justness thereof. . . . United's proposal for increased rates in this proceeding does not constitute a prohibited unilateral change of a contract, for the contract language supplies the purchaser's assent to United's filing of a change in rates.”

In effect, the Commission's position is that the contractual consent to the *act of filing* is sufficient for Section 4(d). Correct though the Commission's statement of the parties' intent may be, it does not answer the question whether the Commission has jurisdiction to accept such a schedule for filing and to proceed under Section 4(e) to review United's filing of a new rate, where the level of the new rate itself has not been previously agreed upon by the parties to the contract. We know as a fact that not only Mississippi but Texas Gas and Southern Natural as well have not consented to the amount of the new rate, since all three of them are now opposing United's increase before the Commission.

#### IV.

The Supreme Court's opinion, in describing the relation of Sections 4 and 5, stated clearly that Section 4(d) was merely a requirement that the Federal Power Commission and the public be formally notified of any change made in any contract for the sale of gas by a natural gas company. 350 U. S. at 339. The notice contemplated by Section 4(d) is notice of the fact that the contracting parties have reformed their contract: that the seller has offered, and the buyer has agreed to, a particular new price to be effective no less than thirty days after the

Commission is notified of the change. 350 U. S. at 339-40. It is only at this point—after the parties have negotiated privately a new price term—that the Commission, under Section 4(d) and (e), in any way becomes involved with the rate changing process. Nothing in Section 4(e) gives the Commission authority to assist the parties in negotiating a new price term.

Under the rule in *Mobile*, for the Commission to review rates under the more expeditious procedure of Section 4(e), the seller must bring to the Commission a negotiated agreement. And that agreement to the new rate must be as specific in its terms as was the previous contractual agreement to the rate schedule sought to be superseded. See 18 C. F. R. Pt. 154. If such a new rate schedule has been properly agreed upon and is filed pursuant to Section 4(d), the Federal Power Commission may then under Section 4(e) undertake to review the new rate by ordering a hearing on the "lawfulness" of the new rate filing; and the Commission may suspend temporarily the non-industrial part of the new rate. To the extent that the Federal Power Commission is convinced by the filing company that the new rate is neither unjust nor unreasonable, that new rate may be approved, or a lower rate may be approved, or the new rate may be found unlawful in its entirety and, if necessary, appropriate refunds may be ordered.

To quote *Mobile*:

"The relationship of these sections [§§4, 5] thus affords no support to petitioners' characterization of §4(d) and (e) as establishing a rate-changing 'procedure'—a 'proceeding' before the Commission 'initiated' by a natural gas company filing a 'proposed' change. Section 4(d) provides not for the filing of 'proposals' but for notice to the Commission of any 'change . . . made by' a natural gas company, and the change is effected, if at all, not by an order of the Commission but solely by virtue of the natural gas company's own action. If the purported change is one the natural gas company has the power to

make, the 'change' is completed upon compliance with the notice requirement and the new rate has the same force as any other rate—it can be set aside only upon being found unlawful by the Commission. It is thus no more a 'proposed' rate than any other rate, all of which are equally subject to Commission review. Likewise, no 'proceeding' is 'initiated' by a §4(d) filing. A proceeding to review the new rate may be initiated under §4(e), but, if so, it is initiated by the Commission in the same manner as a proceeding under §5(a) to review any other rate, that is, upon complaint or its own motion." 350 U. S. at 342.

## V.

For these reasons, we hold that since United had not obtained the consent of its contract customers to the rate itself—albeit some of those customers may have consented to the act of filing—the Federal Power Commission had no power to file the new rate schedules under Section 4(d) and therefore could not review the new rate pursuant to Section 4(e). It is not sufficient for a Section 4(d) filing that United's customers have consented to allow United to have the Commission invoke Section 4(e) to review a rate increase during the contract term, where the parties have not agreed to the specific rate. Doubtless the contracting parties could have agreed on a third party to arbitrate a dispute when the seller sought to raise its price. But the Federal Power Commission has not been given that arbitration function by statute.

Again to quote *Mobile*:

"These sections [§§4, 5] are simply parts of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful. The Act merely defines the review powers of the Commission and imposes such duties on natural gas companies as are necessary to

effectuate those powers; it purports neither to grant nor to define the initial rate-setting powers of natural gas companies.

"The powers of the Commission are defined by §§4(e) and 5(a). The basic power of the Commission is that given it by §5(a) to set aside and modify any rate or contract which it determines, after hearing, to be 'unjust, unreasonable, unduly discriminatory, or preferential.' This is neither a 'rate-making' nor a 'rate-changing' procedure. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them. Section 5(a) would of its own force apply to *all* the rates of a natural gas company, whether long-established or newly changed, but in the latter case the power is further implemented by §4(e). All that §4(e) does, however, is to add to this basic power, in the case of a newly changed rate or contract (except 'industrial' rates), the further powers (1) to preserve the status quo pending review of the new rate by suspending its operation for a limited period, and (2) thereafter to make its order retroactive, by means of the refund procedure, to the date the change became effective. The scope and purpose of the Commission's review remain the same—to determine whether the rate fixed by the natural gas company is lawful." 350 U. S. at 341.

The contracting parties cannot, of course, vest the Federal Power Commission with power not given to that body by Congress.<sup>3</sup>

<sup>3</sup> Judge Bazelon and the present writer, speaking only for ourselves, wish to add that in our view acceptance of the position of the Commission and the intervenors in this case would be to give approval to a ready means of debilitating Section 5(a). That section contemplates, *inter alia*, that a natural gas company, claiming that its rates are too low, may seek to have the Federal Power Commission hold a hearing to review its present rates. In that hearing, a record must be made on which the Commission can

From this discussion it follows that we must reverse and remand this case to the Federal Power Commission for further proceedings not inconsistent with this opinion, and with directions to reject the schedules filed by United and to initiate such proceedings as may be necessary to secure refunds of the incremental amounts paid to United since the time that those schedules were erroneously allowed to become effective.

*So ordered.*

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decide whether the present rates are "unjust, unreasonable, unduly discriminatory, or preferential." And if the rates, after hearing, are found to be too low the Commission may order the rates increased to a lawful level. Respondent and intervenors would have us hold that the natural gas company seeking an increase could avoid that statutory scheme by securing its customer's consent merely to the act of filing, and with such consent be entitled to Commission review under Section 4(e). By using the Section 4(e) procedures the company could get its rates into effect quickly and would avoid both the delay and the more stringent proof requirements of Section 5(a). In the Section 4(e) hearing, according to respondent and intervenors, the filing party would merely be required to show that the new rate—a rate to which, by hypothesis, its customers had not consented—is one which is not unlawful, i.e., that it is a rate within a zone of reasonableness, *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246, 251 (1951); *Sierra Pacific Power Co. v. Federal Power Commission*, 96 U. S. App. D. C. 140, 142, 223 F. 2d 605, 607 (1955), without reference to the lawfulness or adequacy of the old rate. In a Section 5(a) hearing, however, a record would have to be made showing not only that the new rate was lawful, but that the old rate was "unjust, unreasonable, unduly discriminatory, or preferential." And under Section 5(a) if the new, non-consented rate, or any part of it, were approved, it would not become effective until after the hearing was concluded and the increase ordered formally by the Commission. The company awarded the increase would, in addition, have to file under Section 4(d) a new schedule reflecting the rate awarded.

## UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 13,666.

OCTOBER TERM, 1957.

MEMPHIS LIGHT, GAS AND WATER DIVISION; CITY OF MEMPHIS,  
TENNESSEE; AND MISSISSIPPI VALLEY GAS COMPANY,*Petitioners,*

v.

FEDERAL POWER COMMISSION,

*Respondent,*UNITED GAS PIPE LINE COMPANY; TEXAS GAS TRANSMISSION  
CORPORATION; and SOUTHERN NATURAL GAS COMPANY,*Intervenors.*

On Petition to Review of Orders of the Federal Power Commission. Before: BAZELON, WASHINGTON and BASTIAN, Circuit Judges.

**Judgment.**

This case came to be heard on the record from the Federal Power Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the orders of the said Federal Power Commission on review herein be, and they are hereby, reversed, and that this case be, and it is hereby, remanded to the Federal Power Commission for further proceedings not inconsistent with the opinion of this Court, and with direction to reject the schedules filed by United Gas Pipe Line Company and to initiate such proceedings as may be necessary to secure refund of the incremental amounts paid to United Gas Pipe Line Company since the time that those schedules were erroneously allowed to become effective.

Dated: November 21, 1957.

Per CIRCUIT JUDGE WASHINGTON.

## **APPENDIX B.**

### **Relevant Sections of Natural Gas Act.**

#### **RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES.**

**SEC. 4. (a)** All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

**(b)** No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

**(c)** Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

**(d)** Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice

shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas

company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

#### FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION.

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

## APPENDIX C

### Relevant Rules Governing Rate Schedules and Tariffs

• • •

**§154.34 Composition of tariff.** The tariff shall contain, in the order named, sections setting forth a table of contents, a preliminary statement, a map of the system, the rate schedules, general terms and conditions, form of service agreement and an index of purchasers: *Provided, however,* That rate schedules for which special exception has been obtained under §154.52 may be filed in a separate volume as permitted by §154.33.

Rate schedules shall be grouped according to class and numbered serially within each group, using a letter before the serial number to indicate the class of service. For example, G-1, G-2 may be used for general service; CD-1, CD-2 for contract demand service; I-1, I-2 for interruptible service; T-1, T-2 for transmission service; X-1, X-2 for schedules for which special exception has been obtained.

• • •

**§154.38 Composition of rate schedule.** The sheets of a rate schedule shall contain a statement of a rate or charge and all terms and conditions governing its application, arranged as follows:

(a) *Title.* Each rate schedule shall have a title consisting of a designation (see §154.34), and a statement of the type or classification of service to which it is applicable.

(b) *Availability.* This paragraph shall describe the conditions under which the rate is available, and, if necessary, the geographic zone in which available.

(c) *Applicability and character of service.* This paragraph shall fully describe the kind or classification of service to be rendered.

(d) *Statement of rate.* Except as permitted in §§154.52 and 154.82, all rates shall be clearly stated in cents or in

dollars and cents-per unit. Only the rates and charges to be used in current billing shall be included in the rate schedules.

A rate having more than one part shall have each part set out separately under appropriate headings such as: Demand Charge, Commodity Charge, etc. The minimum bill and other provisions affecting charges shall not be included in this paragraph, but shall be included in subsequent paragraphs.

No rule, regulation, exception or condition such as tax, commodity price index, wholesale price index, purchased gas cost adjustment clauses or other similar price adjustments or periodic changes shall be included in the rate schedule or any other part of the tariff which in any way purports to effect the modification or change of any rate or charge specified in the rate schedule, or the substitution therefor of any other rate or charge: *Provided, however*, a natural-gas company may state in the service agreement or in rate schedules filed pursuant to §154.52 that it is or will be its privilege, under certain specified conditions, to propose to the Commission a modification, change or substitution of the then effective rate or charge: *Provided further*, That no such clause may effectuate a change in an effective rate or charge except in the manner provided in section 4 of the Natural Gas Act, as amended, and the regulations in this part.

(e) *Minimum bill.* The minimum bill heading shall appear on every rate schedule followed by the word "none" if no minimum bill is provided.

(f) *Other provisions.* All other major provisions governing the application of the rate schedule, such as determination of billing demand, contract demand, heat content, measurement base, shall be set forth similarly with appropriate headings, or if appropriate, they may be incorporated by reference to the applicable general terms and conditions.

(g) *Applicable general terms and conditions.* This paragraph shall list by reference the general terms and

conditions set forth in the following section which apply to the particular rate schedule.

• • •

**§154.40 Composition of service agreement.** There shall be submitted as part of the tariff an unexecuted copy of each form of service agreement. The service agreement forms should provide for insertion of such items as the name of the purchaser, service to be rendered, area to be served, maximum obligation to deliver, delivery points, delivery pressure, applicable rate schedules by reference to the tariff, effective date and term, and identification of any prior agreements being superseded.

• • •

**§154.52 Exception to form and composition of tariff.** Upon application and for good cause shown, the Commission may permit special rate schedules to be filed in the form of an agreement in the case of special operating arrangements such as for exchange or transportation of natural gas; or for the sale of gas at charges computed on a cost-formula basis, which charges need not be stated in cents or in dollars and cents per unit. Such rate schedules shall conform to the form, type and size specified in §154.32 and shall contain on each sheet the marginal notations specified in §154.33. In addition each such rate schedule shall contain a title page which shall show its designation, the parties to the agreement, the date of agreement and a brief generalized description of services to be rendered. Such rate schedules shall not contain any supplements. Any modifications shall be by revised or insert sheets.

Such rate schedules may be included in a separate volume of the tariff, which shall contain a table of its contents. This table of contents shall also be incorporated with the table of contents of other volumes.

• • •

**§154.82 Requirement for restatement.** All effective schedules of rates, charges, classifications, practices, regulations, and contracts not prepared in accordance with §§154.31 through 154.41 shall be restated and filed as parts

of a Tariff in accordance with said sections on or before the dates specified in §154.83 and duly posted at the time of filing: *Provided, however,* That price provisions which cannot be restated in cents or in dollars and cents per unit, as required by §154.38 (d), without effecting a change in rates or charges may be retained in effect without change. *Provided, further,* That when necessary, pending completion of restatement within the time provided for by §154.83, schedules may be filed in accordance with Part 154 as in effect prior to December 1, 1948.

§154.85 *Status of contracts filed as rate schedules and restated.* Each contract, which is now filed as an effective rate schedule, may be continued in effect and shall be considered as an executed service agreement to the extent that the provisions thereof are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff, until such contract expires by its presently provided terms or is replaced by an executed service agreement in a form contained in the tariff: *Provided, however,* That the natural-gas company, concurrent with the filing of the tariff, shall submit, for insertion in front of each such contract, a statement identifying the provisions thereof which are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff and which are to remain in effect.

*Provided further, however,* That agreements intended to effect a change or amendment in such contract may be made only by the execution of a form of service agreement contained in the tariff.

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AUG 1 1958

JOHN T. PEY, Clerk

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1958

No. 28

**TEXAS GAS TRANSMISSION CORPORATION AND  
SOUTHERN NATURAL GAS COMPANY,**

*Petitioners,*

*v.*

**MEMPHIS LIGHT, GAS AND WATER DIVISION, CITY  
OF MEMPHIS, TENNESSEE, AND MISSISSIPPI  
VALLEY GAS COMPANY,**

*Respondents.*

**BRIEF FOR PETITIONERS.**

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August 1, 1958.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1958

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No. 26

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TEXAS GAS TRANSMISSION CORPORATION  
and SOUTHERN NATURAL GAS COMPANY,

*Petitioners,*

*v.*

MEMPHIS LIGHT, GAS AND WATER DIVISION, CITY OF MEMPHIS,  
TENNESSEE, and MISSISSIPPI VALLEY GAS COMPANY,

*Respondents.*

---

**BRIEF FOR PETITIONERS.**

**Opinions Below.**

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 262-71) is reported at 250 F. 2d 402. The opinion and orders of the Commission (R. 224-37 and 245-8) appear at 16 F. P. C. 19 and 15 P. U. R. 3d 279.

**Jurisdiction.**

The judgment of the Court of Appeals was entered on November 21, 1957 (R. 272). The petition for a writ of certiorari was filed December 31, 1957, and was granted February 3, 1958. The Court ordered consolidation with Nos. 23 and 25, in which petitions for certiorari by United Gas Pipe Line Company (herein called United) and the Federal Power Commission (herein called Commission),

respectively, were granted on the same day (October Term, 1957, Nos. 691, 694 and 695). The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. §1254(1), and §19(b) of the Natural Gas Act.\*

### Question Presented.

The service agreements between a natural-gas company and its customers contain the following provision:

"All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule [here is inserted the appropriate rate schedule designation], or any effective superseding rate schedules, on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached thereto and filed with the Federal Power Commission which are by reference made a part hereof."

Does the Natural Gas Act, as construed in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332, require a natural-gas company under such service agreements to obtain the agreement of its customers to the level of its new rates before the company may file, and the Federal Power Commission accept for filing, superseding schedules changing rates.

### Statute Involved.

The statute involved is the Natural Gas Act (herein called Act).<sup>\*</sup> Relevant portions are printed in Appendix A hereto.

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\* Act of June 21, 1938 (52 Stat. 821-833), as amended by Act of February 7, 1942 (56 Stat. 83-84); July 25, 1947 (61 Stat. 459), and March 27, 1954 (68 Stat. 36); 15 U. S. C. §§ 717-717w.

### Statement of Case.

Although the issues in this case are comparatively simple and narrow, the consequences of their erroneous determination by the court below are complex, far-reaching and important. We refer to and join in the detailed statement of the case in the Commission's brief. We state below only so much of the case as is necessary to an understanding of the arguments here presented.

United is a natural gas pipeline company. It has service agreements under which it makes jurisdictional sales of gas to more than 40 customers. The petitioners Texas Gas Transmission Corporation (herein called Texas Gas) and Southern Natural Gas Company (herein called Southern) which are natural gas pipeline companies, are among such customers, as is respondent, Mississippi Valley Gas Company (herein called Mississippi Valley), a local distribution company. Mississippi Valley also purchases gas from Texas Gas and Southern. Respondent Memphis Light, Gas and Water Division (herein, jointly with respondent City of Memphis, called Memphis) operates the local distribution system in Memphis, Tennessee, and purchases gas only from Texas Gas.

Each of United's service agreements contains the provision quoted in the "Question Presented" referring to an appropriate rate schedule, or any effective superseding schedule, on file with the Commission.\* United and its customers understood and intended that under this provision

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\* Two of the agreements here involved, one with Texas Gas, dated April 16, 1945 (R. 100-8) and one with Southern, dated May 7, 1951 (R. 83-8) do not explicitly contain the quoted provision but, as explained by the court below, it accepted "the Commission's representation in its brief that all of the contracts contain the disputed clause or its equivalent" (R. 266, fn. 2).

United could file superseding schedules setting new rates payable by United's customers when effective as lawful rates under the Act. The customers did not intend to waive their rights to contest the justness and reasonableness of these new rates under the standards of the Act. But they did intend to confer upon United full power to file such new rates. Certainly that was the intention of United and Texas Gas and Southern as customers of United (R. 153-4, 168-70, 171-4, 179-80).

Superseding rate schedules increasing all its jurisdictional rates were filed by United on September 30, 1955 and the Commission thereafter entered upon a hearing under §§4, 5 and 15 of the Act (R. 115-8).

At this hearing the level of the increased rates was contested by these petitioners, the respondents, and others who intervened for that purpose (R. 118-21, 130-7, 167-9). At that time, no one questioned the power of United to file the superseding rate schedules or the jurisdiction of the Commission to receive them for filing and review.

The position initially taken at that hearing by the respondents is significant, for it leads to the factual conclusion that the respondents, like the petitioners, understood the rate provision in the service agreements as granting to United the right to file superseding rate schedules which would then determine its rates, subject only to their being set aside or modified by the Commission. It was not until this Court's decision in the *Mobile* case that Mississippi Valley suddenly decided that it had never intended the quoted provision to mean what the words plainly say. It was not until then that it sought to escape from its bargain and retain the initial rate for the entire term of its service agreement. Similarly, not until then did Memphis decide to espouse its present interpretation of Texas Gas' service agreements with United.

After the *Mobile* decision the respondents, relying solely on that case, moved to have the Commission reject the superseding rate schedules filed by United on the ground that the Commission had no jurisdiction to receive them (R. 143-8, 162-6). This motion was denied, the Commission concluding that United was empowered by its service agreements to change its rates (R. 231), that the filing of its new schedules did not constitute a unilateral change of rate contracts (R. 236-7), and that United's filing and the Commission's review of the filed rates, therefore, were "wholly consistent" with *Mobile* (R. 230).

Respondents then brought the case before the Court of Appeals on a petition for review pursuant to §19(b) of the Act. United, Texas Gas and Southern intervened in support of the integrity of this price provision and the Commission jurisdiction.

That court reversed the Commission, relying like respondents, solely on the *Mobile* case. According to the court below, before superseding rate schedules can be filed with the Commission, the level of new rates must be negotiated and agreed upon between a natural-gas company and its customers. That court apparently concludes from the *Mobile* decision that the Commission has no "jurisdiction" to receive superseding schedules for filing absent such negotiated rates.

### Summary of Argument.

United's service agreements provide that the rates payable are those contained in United's schedules on file with the Commission—the original designated schedule or any effective superseding schedule.

The company and its customers do not agree upon any fixed rate per unit of gas delivered for the term of the agreement. The original rate schedule is binding upon the customer and a superseding rate schedule is equally bind-

ing upon the customer. The service agreement does not dignify one over the other.

To be binding, any new rate schedule must be "superseding", it must be on file with the Commission, and it must have become "effective" under the Act.

The validity of such a contract provision under contract law is clear since a specific price can be determined by reference to an external standard and the parties agree to be bound by the price so determined.

The jurisdiction of the Commission to receive United's rate schedules for filing and review is likewise clear. Jurisdiction is granted to the Commission under the Act by the familiar statutory technique of requiring the seller to file its rates with the Commission to enable the exercise of the Commission's regulatory powers.

The Act requires the filing of all rates, "made, demanded, or received" that they may be reviewed by the Commission (§§4, 5[a]). Nothing in the Act requires a natural-gas company to obtain the agreement of its customers to its rates—whether such rates be initial rates or changed rates. Accordingly, when filing superseding schedules changing rates, a natural-gas company is not required under the Act to obtain the agreement of its customers to its changed rates unless such agreement is required under contract law because the new rates would change rates which the company and its customers had agreed upon for a stated term.

Congress in the Act, as construed by this Court in the *Mobile* case, has imposed certain notice and filing requirements (§4[d]) upon compliance with which the seller can make a changed rate "effective" as a lawful rate. Any method of achieving effectiveness is authorized if it satisfies the filing requirements of the Act and is not precluded by agreement of the parties. Such a permitted method was used by both United and the Commission, with these petitioners' and Mississippi Valley's contractual assent.

Yet, the court below and the respondents say that the Commission has no jurisdiction to receive for filing schedules changing rates unless the new rates have been negotiated and agreed upon between the natural-gas company and its customers.

Where in §4(d) is there any language even hinting at such a requirement?

Nor, can it reasonably be said that Commission review of rates not specifically agreed to by buyer and seller casts the Commission in an unauthorized role of private arbitrator. The Commission's review function under the Act remains a public one: to determine whether the rates filed are just, reasonable and not unduly discriminatory or preferential. The service agreements here involved provide that the rates so determined are the rates payable—the only lawful rates that could be payable under the Act.

The opinion below must therefore depend upon a showing that the *Mobile* case in some way restricted the jurisdiction of the Commission. And, that is the breaking point in the reasoning of the opinion here under review.

In the *Mobile* case the seller attempted to raise, without the consent of the buyer, a specific rate fixed by contract for its entire term, merely by filing with the Commission a rate schedule containing a higher rate. This Court held that nothing in the Act gave the seller the power unilaterally to change the terms of the agreement it had made.

That this Court was concerned with unilateral changes of contracts is abundantly clear from an examination of the *Mobile* opinion. It was concerned with United's increased rate schedule only insofar as it represented an attempted violation of a contract fixing a specific rate for the contract's term.

The only holding with reference to the Commission's jurisdiction in the *Mobile* opinion is in its final paragraph.

This Court stated that the Commission had authority to reject unauthorized filings and its failure to do so was error. The basis for that ruling was that the new schedule insofar as it purported to make a unilateral contract change was a nullity.

But here we are not dealing with a unilateral contract change. We are dealing with superseding rate schedules which United was authorized by the agreement of its customers to file, an agreement valid under contract law and not vitiated by anything in the *Mobile* opinion. The superseding rate schedules were therefore equally valid.

It follows that the *Mobile* case affords no support to the respondents. On the contrary, it shows that respondents' contentions and the holding of the court below are clearly in error. For this Court's opinion expressly pointed out that rates may be changed by the filing under §4(d) of new schedules where a natural-gas company has not, by virtue of its contracts, surrendered its power to file such schedules.

### Argument.

The meaning of the rate provision in the service agreements—the contractual provision effectively destroyed by the Court of Appeals—is the starting point for our argument.

#### I.

United's service agreements contemplated rate changes by the seller and the filing under §4(d) of schedules of the rates so changed.

The rate provision in the service agreements clearly binds the customer to pay for gas delivered under "any effective superseding rate schedules, on file with the Federal Power Commission." To be binding, the new rate schedule must be "superseding"; it must be "effective"; and it

must be on file with the Commission. This much would seem to be beyond dispute.

The court below would construe this provision as a hollow "consent to the act of filing" and respondents apparently would now construe this provision as merely recognizing the paramount power of the Commission under §5(a) of the Act to change contract rates.

The error of these constructions is briefly demonstrated.

#### **Formulation of the rate provision.**

When United's service agreements were executed, United and its customers were aware of and thoroughly understood the meaning of this provision and the kind of sales arrangements which it contemplated and which the Commission had prescribed.

The form of United's service agreements is a product of a system of tariff sales arrangements instituted by the Commission in 1948, to which all natural gas pipeline companies have been required to conform (Order No. 144, 13 Fed. Reg. 6371, *et seq.*). This order established sales arrangements for natural-gas companies based on what amounted to a system of posted rates of general application throughout described areas or zones for stated classifications of service. Supplementing these posted rates there were to be separate contracts, or service agreements, as they were called, dealing with the term of service, the quantity of gas and other provisions applicable to the particular customer. The service agreements were to state no rates, but were to designate by reference to the filed tariffs the rate schedules under which service was to be rendered (§§154.34, 154.38 and 154.40).

The words used in the service agreements take on clearer significance in this setting:

"All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule [here is inserted

the appropriate rate schedule designation], or any effective superseding rate schedules, on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached thereto and filed with the Federal Power Commission which are by reference made a part hereof."

**The understanding of the parties and the Commission's holding.**

The record establishes that United's customers, including respondent Mississippi Valley, intended that United should have the power to change its rates and file superseding rate schedules.

The Commission concluded that United's service agreements must be construed as providing that the rate to be charged should be the effective rate on file from time to time with the Commission (R. 230), that changes in such rate could be made by United (R. 231), that such changes could be filed by United under §4(d) of the Act (R. 236), and that United's customers agreed to pay such rates upon their becoming effective after notice under §4(d) or after suspension, review and possible modification under §4(e) of the Act (R. 231).

This interpretation of the service agreement was arrived at, not only from consideration of its language, but also from the Commission's intimate knowledge of the industry, of the meaning and purpose of its own regulations within the framework of which the sales arrangements of all pipeline companies were formulated, and of the general understanding throughout the industry of the meaning of service agreement provisions for payment under superseding rate schedules. It also was based on certain factual findings, which it was particularly within the Com-

mission's competence to make, and on inferences of fact drawn by it concerning the contractual intent of the parties as expressed in the language of their agreements. Such findings of fact are made conclusive if supported by substantial evidence (§19[b] of the Act) and such factual inferences are entitled to acceptance by the courts if there is warrant in the record for them, even though a reviewing court might draw a different inference. *N. L. R. B. v. Pennsylvania Greyhound Lines*, 303 U. S. 261, 270-1; *Parker v. Motor Boat Sales*, 314 U. S. 244, 246; *N. L. R. B. v. Southern Bell Teleph. & Teleg. Co.*, 319 U. S. 50, 60; *N. L. R. B. v. Hearst Publications*, 322 U. S. 111, 130; *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474.

There can be no question concerning the facts upon which the Commission relied for they concerned formal actions or lack of action before it of United's many customers. Thus, the Commission found:

"Further, there is to be considered the actions of the parties under the contracts.\* \* \* Since each customer was directly informed of United's filing now under consideration, as well as previous rate increase filings, and Mobile and Tyler Gas were the only customers who, prior to the *Mobile* decision, contended that such changes were contrary to the terms of their agreements with United, it can only be concluded that all other customers were of the belief that their agreements gave United the power to make unilateral changes in the existing rates.[\*]

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\* The Mobile and Tyler contracts referred to by the Commission were special contracts negotiated to take care of special situations and did not provide for payment under "any effective superseding rate schedules on file with the Commission", but, instead provided for a fixed price for a stated term, 350 U. S. at 336; *Tyler Gas Service Co. v. Federal Power Commission*, 247 F. 2d 590, 591-3 (D. C. Cir. 1957), cert. denied, 355 U. S. 895.

"This view is supported by Southern Natural and Texas Gas. These two customers, both in their answers in support of the position of United in this instant matter and in oral argument before us, have stated that it was the understanding and intent of the contracting parties to grant United the power to make changes in rates pursuant to section 4(d) of the Natural Gas Act, without waiver, however, of the right of the purchasers to oppose such changes in proceedings before the Commission for the purpose of testing the reasonableness and justness thereof. And these parties, as well as practically all other customers of United, have acted through the years in accordance with this contractual purpose and intent" (R. 234-5).

It cannot be said that the factual inferences drawn by the Commission were unreasonable. Certainly, it is reasonable to conclude that the parties to United's service agreements were alert to protect their own interests and would have contended that United had no right under its service agreements to change its rates if that had been their understanding of their agreements.

Conversely, neither United nor any other pipeline company would have conducted the bulk of its business under long term contracts at fixed prices and under the law of the *Mobile* case could not have been required to do so. The Commission could review rates, but it was for the seller to establish them in the first instance. And to have established general rates which could not be changed to reflect changing costs would have been economic suicide.

It is worthy of note also that, even after this Court's decision in the *Mobile* case, only two of United's many customers who purchase gas under service agreements in the form involved here took a position contrary to

the Commission's construction of United's service agreements." And most of United's customers are distributors of gas rather than pipelines, which the respondents charge with having a special interest in supporting the Commission's view of United's service agreements because their own service agreements provide for rate changes.

That the Commission's construction of the price provision of United's service agreement is, in fact, correct is conclusively borne out by the instrument itself. Each service agreement was for a long term and did not set forth a price per unit of gas delivered. That price was to be found in a designated rate schedule then on file with the Commission, or in a superseding rate schedule to be filed with the Commission in the future. The contract does not dignify one over the other. The original rate schedule was to be binding upon the customer and a superseding rate schedule when effective under the Act was to be equally binding upon the customer.

This reading of the phrase "any effective superseding rate schedules" is strongly buttressed by the second sentence in the price provision which states: "This agreement in all respects shall be subject to the applicable provisions of such rate schedules \* \* \* which are by reference made a part hereof." The words "such rate schedules" plainly refer back to "any effective superseding rate schedules," as well as to the rate schedule indicated by specific designation. Were this not true, only the designated rate schedule would be mentioned and certainly the reference back would not employ the plural "schedules".

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\* These are Mississippi Valley and Willmut Gas and Oil Company. The latter's petition for review from the same Commission order involved here resulted in a reversal by the Court of Appeals on the authority of this case, *Willmut Gas & Oil Co. v. Federal Power Commission*, 251 F. 2d 381 (D. C. Cir. 1957).

### **Significance of the Act and Regulations to the parties' understanding.**

By agreeing to sell and buy in accordance with "any effective superseding rate schedules, on file with the Federal Power Commission", United and its customers, by inescapable implication, agreed to sell and pay for gas in accordance with a stated price as such price might be changed by United from time to time and that United might make such changes as were consistent with the rate standards provided in the Act by filing new rate schedules under §4(d).

They recognized that the Commission would, in the discharge of its public duty, suspend and revise any rates filed that were unjust, unreasonable, or unduly discriminatory or preferential. There is nothing extraordinary in such a concept. One who enters into a contract does so in contemplation of existing law and the applicable law is imported into his contract, and every contracting party relies upon his expectation that the law will be observed, or, if not voluntarily observed, enforced by proper public authority charged with its enforcement. The parties in the instant case did no more and no less, as the language of their agreements shows.

Respondents seek to avoid the clear meaning of the price provision by a contention (Brief in Opposition, pp. 15-16) that the service agreement provision for payment in accordance with "any effective superseding rate schedules" has reference, not to schedules filed by United under §4(d), but only to new rates fixed by the Commission in a §5(a) proceeding. They argue that the provision is nothing but an agreement "that the contracts are subject to the paramount power of the Commission to modify them in the public interest".

Of course the service agreements are subject to the paramount power of the Commission to modify them in the public interest. *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372. No provision is needed in an agreement to establish this. It adds nothing to say, as do the respondents, that the purpose was to preclude a defense by the customer of illegality or impossibility based on the Commission's action by requiring the parties to perform under the agreement as modified by the Commission. Any contract which is subject to regulation by public authority and which is changed by the lawful exercise of that authority continues thereafter in full force and effect as modified. *Northern Pacific Ry. Co. v. St. Paul & Tacoma Lumber Co.*, 4 F. 2d 359 (9th Cir. 1925), *appeal dismissed*, 269 U. S. 535; *Market Street Ry. Co. v. Pacific Gas & Electric Co.*, 6 F. 2d 633 (N. D. Cal. 1925), *appeal dismissed*, 271 U. S. 691; *Hinkel Dry Goods Co. v. Wichison Industrial Gas Co.*, 64 F. 2d 881 (10th Cir. 1933), where the Court stated:

"Even where the state has modified the rates fixed in such a contract, it is not thereby abrogated but, as modified, continues to be binding on the parties thereto, because such contracts are presumed to have been made in contemplation of the paramount power of the state to regulate the rates" (p. 883).

To construe the price provision in these service agreements as nothing but an agreement to continue to perform if the Commission modified the rate under §5(a) is to strip the provision of contractual significance and read it out of the agreement.

The fact of the matter is that the provision contemplated changes in rates by United and the filing of such rates by United under §4(d). Indeed, the Commission's regulation which authorized the inclusion of clauses of this kind in service agreements explicitly states:

"... no such clause may effectuate a change in any effective rate or charge except in the manner provided in Section 4 of Natural Gas Act, as amended, and the regulations in this part" (§154.38 [d][3]).

While the respondent, Mississippi Valley, now contends that the construction given to the service agreements by the Commission, United and these petitioners is "an after-rationalization born of the *Mobile* decision and advanced to avoid it" (Brief in Opposition, p. 14), the sequence of events clearly demonstrates where the "after-rationalization" lies.

The Court of Appeals for the Third Circuit decided on September 7, 1954, in *Mobile Gas Service Corp. v. Federal Power Commission, et al.*, 215 F. 2d 883, *aff'd*, 350 U. S. 332, that the fixed-price contract there involved could not be changed unilaterally by the filing of a new rate schedule. A few months later this conclusion gained support when, on February 24, 1955, the District of Columbia Circuit reached a similar conclusion in *Sierra Pacific Power Company v. Federal Power Commission, et al.*, 223 F. 2d 605, *aff'd*, 350 U. S. 348.

Thus, on September 30, 1955, when United filed its increased rates in the present case, Mississippi Valley must have been aware that two courts of appeals had held that a rate filed with the Federal Power Commission could not override the price provision of a fixed-price contract. Had there been any misapprehension by Mississippi Valley that the instant service agreements were fixed-price contracts for an individualized sales arrangement as in *Mobile*, it would seem that a motion to reject the rate schedules here involved would have been made then. Yet, Mississippi Valley did not challenge United's right to make the filing. On the contrary, it petitioned to intervene in the Commission hearing to contest the justness and reasonableness of the new schedules (R. 131) and did so intervene for that purpose.

The interpretation of these service agreements which is now advanced by respondents is thus not only in defiance of the parties' understanding and intent when the agreements were executed, but is inconsistent with the conduct of the parties, including respondents, thereafter.

The construction adopted by the Court of Appeals, on the other hand, admits that the provision contemplated the filing of new schedules by United under §4(d) but would restrict its significance to a meaningless consent to the "act of filing." This admission, however, does not permit such a restriction. It leads inescapably to the conclusion for which petitioners contend since a rate schedule filed under §4(d) establishes the rate payable by the customer unless modified by the Commission. This makes it pointless to argue that an agreement to the act of filing a changed rate is not also an agreement to the changed rate itself.

But the Court of Appeals says that since United's customers opposed the rate increase in the hearing before the Commission, they could not have contractually agreed to the new rates. This is, of course, a *non sequitur*. The contractual commitment is to pay the superseding rate filed by United as permitted to become effective under the Act. The rate filed is subject only to modification by the Commission and the Act gives the customer the right to question the level upon Commission review. That the customer does so is no evidence that he has not agreed to be bound by the rate as filed and made effective under the Act.

When in this case United filed new rate schedules with the Commission, it was not seeking to initiate any "rate-changing procedure" of the Commission in violation of its agreements; it was exercising its power to change rates, in exact accord with the price provision of its service agreements. The rate schedules so filed were subject to suspension and modification by the Commission, in accordance with the powers conferred upon it by Congress.

## II.

**United's service agreements are valid contracts and all their provisions must be given effect.**

No extended discussion is necessary to demonstrate the validity of the service agreements. There is not the slightest reason to suppose that such a price provision as that here involved renders the agreement void for lack of mutuality. Neither the buyer's promise to pay in accordance with future effective schedules nor the seller's promise to deliver gas at those rates is an illusory promise. The performance of neither one is left subject to the will, wish, or desire of the promisor. Each is bound by an irrevocable obligation. And the standard by which the price is to be determined is the standard established in §§4(a) and (b) of the Act which is expressed in terms that have acquired well-understood meaning through two decades of regulation under the Natural Gas Act and many years of public utility regulation prior to the Act's passage.

The sufficiency of a promise as consideration for a return promise is not affected by the fact that it is conditional on approval by a public authority. Provisions in sales contracts incorporating prices as fixed from time to time by governmental agency are, of course, not unusual.\*

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\* See, e.g., *Reconstruction Finance Corp. v. United Distillers Product Corp.*, 113 F. Supp. 468, *aff'd*, 204 F. 2d 511 (2d Cir. 1953), in which the contract provided for payment for ethyl alcohol at prices to be fixed by the Office of Price Administration; *Pfotzer v. United States*, 176 F. 2d 675 (4th Cir. 1949), where the contract specified that "in view of present market conditions, prices herein may be increased by the amount of price increase application on file with Office of Price Administration prior to shipment, or to legal price in effect at time of shipment"; see also, *Ken-Rad Corporation v. R. C. Bohannon, Inc.*, 80 F. 2d 251 (6th Cir. 1935); *Buggs v. Ford Motor Company*, 113 F. 2d 618 (7th Cir. 1940), *cert. denied*, 311 U. S. 688; and *Outlet Embroidery Co. v. Derwent Mills*, 254 N. Y. 179, 172 N. E. 462, (1930) in all of which contracts giving the seller the right to make price changes were upheld.

It is well established that a contract must be interpreted as a whole; no provision should be deleted or disregarded; no new words should be added unless this is required by the plainest of implication and is in accord with actual intention; and every provision must be given effect if it is legally and reasonably possible.

All of these canons were disregarded by the Court of Appeals, which wholly deletes the words "any effective superseding rate schedules" and would, in effect, substitute new words making the promises read thus: "We promise to pay and to deliver in accordance with the presently existing rate schedule or with a superseding rate schedule if and when one may become effective *by our mutual agreement.*"

The deletion compels the parties to perform on a basis to which neither has assented; the addition of the four italicized words causes the provision to become wholly inoperative and superfluous since the contracting parties have power, without any express provision to that effect, to change any provision of their contract by mutual agreement.

The purpose of the price provision was to provide a flexible method of price determination in accord with changing costs and subject to the Act's standard of "just and reasonable". These purposes would be defeated by the decision below and the element of mutual assent would be removed from every service agreement.

The decision of this Court in the *Mobile* case expressly maintained the "integrity of contract". The decision of the Court of Appeals would destroy the "integrity" of hundreds of contracts.

## III.

**Sections 4(d) and (e) of the Act confer jurisdiction upon the Commission to accept for filing "superseding" rate schedules and to permit them to become "effective".**

The draftsmen of the Natural Gas Act nowhere assembled in one place a comprehensive statement of the Commission's jurisdiction. Several techniques were employed to confer jurisdiction. One is illustrated by statements that the Commission may or shall do certain acts, as for example in §§5(b), 6(a), 7(a) and 9(a). Another resulted in provisions that no person or natural-gas company shall do some particular act or thing without obtaining the consent, approval or authorization of the Commission, as for example in §§3, 4(d) and 7(b) and (c).

The latter technique is fully as effective as the former in conferring jurisdiction. For example, it would be absurd to argue that, although the statute provides that "no natural-gas company shall abandon" property "without the permission and approval of the Commission" (§7(b)), the Commission is without jurisdiction to consider applications to abandon property. That would be tantamount to prohibiting abandonments entirely. If complete prohibition were intended, certainly simpler language exists for expressing it. And Congress clearly did not intend such an absurd result, for it gave the Commission broad powers in §16, as follows:

**"The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of this act."**

The argument with reference to filings under §4(d) of the Act is equally obvious. That section provides:

"Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate \* \* \* except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules \* \* \*"

Nowhere in the language of that section is there an express grant of jurisdiction to the Commission to accept filings of any kind. Yet it would not be denied even by the respondents or the court below that under §4(d) the Commission does have jurisdiction to accept for filing schedules changing rates, provided they are proper ones.

The question then is: what is a proper filing? The court below and the respondents say that a filing is proper only when the customer has agreed to the specific price per unit of gas set forth in the schedule. But where in §4(d) is there any language even hinting at such a requirement? Where, for that matter, does such language appear anywhere in the Act?

There is no prohibition against the filing of *ex parte* rates. There is no restriction of Commission jurisdiction to rates negotiated and agreed upon. The Act, of course, looks in the opposite direction. It requires the filing of all rates, "made, demanded, or received"—whether by contract or otherwise—that they may be reviewed by the Commission (§§4, 5[a]).

There is clearly nothing in the Act which would limit Commission jurisdiction only to those rates specifically agreed to by a natural-gas company's customers—whether such rates be initial rates or changed rates.

The Court of Appeals, however, imposed such a limitation. It reasoned that, since purchasers of gas from United opposed the rate increase before the Commission, the Commission was placed in a position of arbitrator although it had "not been given that arbitration function by statute" (R. 269-70). This completely mistakes the nature of the Commission's review under §4(e) of new rates filed under §4(d). And it also disregards the fact that the service agreement contains not one word purporting to give an "arbitration function" to the Commission.

Congress has given the Commission the function of determining the justness and reasonableness of any rate schedule and the service agreement merely indicates that the price to be paid and accepted shall be that stated in a superseding rate schedule when it becomes effective according to law.

By reviewing rates filed under §4(d), the Commission does not purport to settle any contractual or other private right or interest of the seller or buyer. It exercises the public function of determining whether rates are just, reasonable and not unduly discriminatory or preferential. The private interests of the buyer and seller, as well as those of other parties, are wholly unrelated to this function.

The public nature of this review function is exactly the same whether or not the buyer and seller have agreed to the exact rate to be reviewed, as can be demonstrated by reference to a situation where a natural-gas company sells in accordance with filed rate schedules, but has no sales contracts. Clearly these would be *ex parte* rates, and new schedules could be filed under §4(d), as this Court has expressly recognized (350 U. S. at 343). Upon review of the new rates under §4(e), the customer could intervene under §15(a) and oppose the increase. But the customer's opposition to the increase would not deprive the Commis-

sion of jurisdiction under §4(e) or change its public function of determining whether the new rates were lawful into a private arbitration function. For both the Commission's review and the customer's participation in the proceeding would be addressed only to the issue of whether the rates met the Act's standard of just, reasonable and not unduly discriminatory or preferential.

Similarly, an agreement by a buyer and a seller that the latter can file schedules of new rates under §4(d) does not make the Commission an arbitrator of a private dispute, even though the parties have not specifically agreed to the rate level and the customer is permitted to intervene under authority of §15(a) and question it. The Commission's function is the same in either case—to determine whether the new rates conform to the standards established by the Act.

If the change represented by the new schedules is one which the natural-gas company has the power to make, that is, the change is not barred by contract—a question for determination solely in accordance with applicable principles of contract law—the Commission has jurisdiction to review it under §4(e) because that is what the Act clearly provides. And the *Mobile* decision makes this abundantly clear.

#### IV.

The *Mobile* case is no authority for the decision below but on the contrary upholds the filing of rate schedules such as those filed by United here.

This Court in the *Mobile* case did not hold, as the lower court would have it, that changes in rates may only be made by a specific agreement to the new rate. This Court

held that, in the absence of the Act, the seller there had no power to change its contract unilaterally, and that nothing in the Act gave the seller such power.

The facts in the *Mobile* case may be simply stated. Mobile Gas Service Corporation, a distributor of natural gas to domestic and industrial customers, was supplied by United with all its natural gas requirements. In 1946 the Ideal Cement Company planned to construct a plant in the city of Mobile if it could obtain a supply of gas at a low rate. Mobile, therefore, made a special contract with United for the purchase of gas for resale to Ideal at the equivalent of 10.7¢ per Mcf for ten years, a rate substantially lower than that for the other gas sold by United. Mobile, in turn, executed a ten-year contract with Ideal to supply the latter with gas at 12¢ per Mcf.

It was this special contract between Mobile and United, executed to attract the additional business represented by the Ideal sale and outside of the general gas supply arrangements between United and Mobile, which United sought to change unilaterally by filing a new rate schedule with the Commission. At the same time, United also filed rate schedules increasing its other rates to Mobile, but Mobile's contention that the rate filing was ineffective because barred by contract ran only to this special Ideal contract (350 U. S. at pp. 335-7).

Both the Commission and United contended that §§4(d) and 4(e) of the Act provided a "filed-rate procedure" under which a natural-gas company could initiate rate changes, despite conflicting contract obligations, by filing new schedules with the Commission (p. 340).

This Court held, however, that United was without power unilaterally to change its contract. That this Court was concerned with unilateral changes of contracts is

abundantly clear from an examination of the opinion. It was not concerned with the changes in rates as such, but only with rate changes as they represented attempted violations of valid contracts.

The evidence in the *Mobile* case of concern with contracts as such rather than rates as such, is overwhelming:

The question was stated by this Court in terms of whether the supplier, without consent of the customer, might "change the rate specified in the contract \* \* \*" (p. 334).\*

The customer's contention was stated to be that the supplier "could not thus unilaterally change the *contract* rate" (p. 336).

The holding was that the Act does not give companies "the right to change their rate *contracts* by their own unilateral action" (p. 337).

The Court determined that the Act "evinces no purpose to abrogate private rate *contracts* as such \* \* \* [, but,] by requiring *contracts* to be filed with the Commission, \* \* \* expressly recognizes that rates to particular customers may be set by individual *contracts*" (p. 338).

The petitioners there argued that §4(d) of the Act authorizes a supplier "to change its rate *contracts* simply by filing a new schedule of rates." This Court replied that §4(d) "does not purport to say what is effective to change a *contract*, any more than §4(c) purports to define what constitutes a '*contract*' that may be filed with the Commission" (p. 339).

Neither by language nor implication can §4(d) be found to empower suppliers "to change their *contracts* unilaterally" (p. 340).

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\* Emphasis supplied throughout.

To the argument that §5(a) and §§4(d) and (e) set up two separate procedures for rate changing, this Court replied:

"The major defect of this argument is that it assumes the answer to the very question in issue—whether natural gas companies are empowered to 'initiate' unilateral *contract* changes under §4(d). That the so-called 'filed-rate' procedure is applicable to changes in contracts as well as other rates proves only that contracts may be changed, not that they may be changed unilaterally" (p. 340).

The structure and purpose of the Act do not support an inferred right, "not otherwise possessed," of suppliers "unilaterally to change their *contracts*" (pp. 343-344).

The holding, that the Act does not empower suppliers "unilaterally to change their *contracts*," promotes the purposes of the Act (p. 344).

This Court characterized its holding as "preserving the integrity of *contracts*" (p. 344).

Its interpretation precludes suppliers from "unilaterally changing their *contracts*" (p. 344).

The Act gives a supplier "no power to change its *contracts* unilaterally" (p. 347).

The schedule filed in the *Mobile* case "was a nullity insofar as it purported to change the rate set by its *contract*" (p. 347).

The foregoing quotations are scattered throughout the opinion. They are the material of which it is fashioned. They show not only the precise holding of the *Mobile* case, but they also emphasize the reasoning underlying that holding. In other words, this Court started with the legal truism that, normally and in the absence of some power expressly given, one party to a contract may not unilaterally

ally alter it. The Court then examined the Act and found, as it had to, that the Act granted no such power to a natural-gas company.

The opinion also makes it clear that rates may be changed by the filing of new schedules under §4(d) where the natural-gas company has not by virtue of its contracts surrendered its power to file them. For example, this Court stated (at p. 342):

"If the purported change is one the natural gas company has the power to make, the 'change' is completed upon compliance with the notice requirement and the new rate has the same force as any other rate—it can be set aside only upon being found unlawful by the Commission."

The opinion below and the arguments of the respondents depend upon a showing that the *Mobile* case in some way confined and restricted the jurisdiction of the Commission. That is the breaking point for no such showing can be made.

The lower court stated the question as being,

"\* \* \* whether the contract clause quoted above [i.e., the rate clause of the service agreements] provides the 'consent' necessary to give the Federal Power Commission jurisdiction to review under Section 4(e) of the Act United's new schedule filed under Section 4(d)" (R. 267).

It stated its holding to be that,

"\* \* \* since United had not obtained the consent of its contract customers to the rate itself—albeit some of those customers may have consented to the act of filing—the Federal Power Commission had no power to file the new rate schedules under Section 4(d) and therefore could not review the new rate pursuant to Section 4(e)" (R. 269).

The fatal weakness of this basic reasoning in the lower court's opinion is that it finds no support in either the *Mobile* case or the Act. It is an assertion without support anywhere.

The only holding with reference to the Commission's jurisdiction in the *Mobile* opinion is in its final paragraph where this Court stated that the Commission had authority under §16 of the Act to reject unauthorized filings and its failure to reject United's new schedule was error. This holding follows immediately after the statement, quoted above, that a unilateral contract change was not authorized and the new schedule was a nullity insofar as it purported to change the specific rate set by contract. In other words, this Court held merely that the Commission should not have accepted for filing a null and void document.

But here we are not dealing with rate schedules which would change a specific rate set by contract for the term of the agreement.

On the contrary, United preserved its power to file superseding rate schedules under its service agreements which are valid under general law and which are in no way vitiated by anything in the Act or in the *Mobile* opinion.

These agreements are in use throughout the natural gas industry and enable the long-term sales arrangements essential to the industry's continued vigor and expansion.

Their integrity is sustained—not destroyed—by the *Mobile* decision.

### Conclusion

The foregoing analysis is presented to illuminate the fundamental issues which this Court's holding will determine. We have not repeated more detailed arguments which are ably presented in the brief for the Commission.

We join in those arguments, including the statement of the effect of the lower court's decision upon the public, the natural gas industry, regulation of the industry under the Natural Gas Act, and the national economy.

**The decision of the Court of Appeals should be reversed.**

Respectfully submitted,

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## APPENDIX A.

### Relevant Sections of Natural Gas Act.

#### EXPORTATION OR IMPORTATION OF NATURAL GAS.

SEC. 3. After six months from the date on which this act takes effect no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.

. . . . .

#### RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES.

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service,

facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules

and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

#### FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION.

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State,

municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule; regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

#### ASCERTAINMENT OF COST OF PROPERTY

SEC. 6. (a) The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

**EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE**

**SEC. 7. (a)** Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with

respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

#### RATES OF DEPRECIATION

SEC. 9. (a) The Commission may, after hearing, require natural-gas companies to carry proper and adequate depreciation and amortization accounts in accordance with such

rules, regulations, and forms of account as the Commission may prescribe. The Commission may from time to time ascertain and determine, and by order fix, the proper and adequate rates of depreciation and amortization of the several classes of property of each natural-gas company used or useful in the production, transportation, or sale of natural gas. Each natural-gas company shall conform its depreciation and amortization accounts to the rates so ascertained, determined, and fixed. No natural-gas company subject to the jurisdiction of the Commission shall charge to operating expenses any depreciation or amortization charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation or amortization other than that prescribed therefor by the Commission. No such natural-gas company shall in any case include in any form under its operating or other expenses any depreciation, amortization, or other charge or expenditure included elsewhere as a depreciation or amortization charge or otherwise under its operating or other expenses. Nothing in this section shall limit the power of a State commission to determine in the exercise of its jurisdiction, with respect to any natural-gas company, the percentage rates of depreciation or amortization to be allowed, as to any class of property of such natural-gas company, or the composite depreciation or amortization rate, for the purpose of determining rates or charges.

#### HEARINGS; RULES OF PROCEDURE

SEC. 15. (a) Hearings under this act may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any

representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

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### ADMINISTRATIVE POWERS OF COMMISSION; RULES, REGULATIONS, AND ORDERS

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

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## APPENDIX B

### Relevant Sections of Regulations Under the Natural Gas Act

• • •

§154.34 *Composition of tariff.* The tariff shall contain, in the order named, sections setting forth a table of contents, a preliminary statement, a map of the system, the rate schedules, general terms and conditions, form of service agreement and an index of purchasers: *Provided, however,* That rate schedules for which special exception has been obtained under §154.52 may be filed in a separate volume as permitted by §154.33.

Rate schedules shall be grouped according to class and numbered serially within each group, using a letter before the serial number to indicate the class of service. For example, G-1, G-2 may be used for general service; CD-1, CD-2 for contract demand service; I-1, I-2 for interruptible service; T-1, T-2 for transmission service; X-1, X-2 for schedules for which special exception has been obtained.

• • •

§154.38 *Composition of rate schedule.* The sheets of a rate schedule shall contain a statement of a rate or charge and all terms and conditions governing its application, arranged as follows:

(a) *Title.* Each rate schedule shall have a title consisting of a designation (see §154.34), and a statement of the type or classification of service to which it is applicable.

(b) *Availability.* This paragraph shall describe the conditions under which the rate is available, and, if necessary, the geographic zone in which available.

(c) *Applicability and character of service.* This paragraph shall fully describe the kind or classification of service to be rendered.

(d) *Statement of rate.* Except as permitted in §§154.52 and 154.82, all rates shall be clearly stated in cents or in

dollars and cents per unit. Only the rates and charges to be used in current billing shall be included in the rate schedules.

A rate having more than one part shall have each part set out separately under appropriate headings such as: Demand Charge, Commodity Charge, etc. The minimum bill and other provisions affecting charges shall not be included in this paragraph, but shall be included in subsequent paragraphs.

No rule, regulation, exception or condition such as tax, commodity price index, wholesale price index, purchased gas cost adjustment clauses or other similar price adjustments or periodic changes shall be included in the rate schedule or any other part of the tariff which in any way purports to effect the modification or change of any rate or charge specified in the rate schedule, or the substitution therefor of any other rate or charge: *Provided, however*, a natural-gas company may state in the service agreement or in rate schedules filed pursuant to §154.52 that it is or will be its privilege, under certain specified conditions, to propose to the Commission a modification, change or substitution of the then effective rate or charge: *Provided further*, That no such clause may effectuate a change in an effective rate or charge except in the manner provided in section 4 of the Natural Gas Act, as amended, and the regulations in this part.

(e) *Minimum bill.* The minimum bill heading shall appear on every rate schedule followed by the word "none" if no minimum bill is provided.

(f) *Other provisions.* All other major provisions governing the application of the rate schedule, such as determination of billing demand, contract demand, heat content, measurement base, shall be set forth similarly with appropriate headings, or if appropriate, they may be incorporated by reference to the applicable general terms and condition.

(g) *Applicable general terms and conditions.* This paragraph shall list by reference the general terms and

3b

conditions set forth in the following section which apply to the particular rate schedule.

§154.40 *Composition of service agreement.* There shall be submitted as part of the tariff an unexecuted copy of each form of service agreement. The service agreement forms should provide for insertion of such items as the name of the purchaser, service to be rendered, area to be served, maximum obligation to deliver, delivery points, delivery pressure, applicable rate schedules by reference to the tariff, effective date and term, and identification of any prior agreements being superseded.

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# **Supreme Court of the United States**

OCTOBER TERM, 1958

**No. 26**

**TEXAS GAS TRANSMISSION CORPORATION AND  
SOUTHERN NATURAL GAS COMPANY,**

*Petitioners,*

*v.*

**MEMPHIS LIGHT, GAS AND WATER DIVISION, CITY  
OF MEMPHIS, TENNESSEE, AND MISSISSIPPI  
VALLEY GAS COMPANY,**

*Respondents.*

## **REPLY BRIEF FOR PETITIONERS TEXAS GAS AND SOUTHERN**

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October 16, 1958

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IN THE

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*Petitioners,*

v.

MEMPHIS LIGHT, GAS AND WATER DIVISION, CITY OF MEMPHIS,  
TENNESSEE, and MISSISSIPPI VALLEY GAS COMPANY,

*Respondents.*

---

## REPLY BRIEF FOR PETITIONERS TEXAS GAS AND SOUTHERN.

The question in this case is simply stated: under the service agreements here before the Court, does the Natural Gas Act, as construed in the *Mobile* case, require a natural-gas company to have its customers agree to the level of new rates before it may file, and the Federal Power Commission accept for filing, superseding rate schedules?

The respondents, however, refuse to face that simple issue. Indeed, they have taken pains to avoid facing it and to erect a circumlocution in which the issue may be stated in terms of an "agreement on a rate-changing procedure" (Resps. br., p. 2). This phrase is used by respondents in an obvious effort to flavor their argument with the thought that perhaps the parties by agreement have attempted to

usurp the legislative powers and prescribe a rate-changing function for the Federal Power Commission.

We intend to accept no such false issue. The procedure to be followed by the Commission is prescribed by the Act, and we rest our case upon the Act as construed in the *Mobile* case.

### **Respondents' Contention as to the Act.**


Respondents state at the outset of their argument as purportedly dispositive of this appeal:

"The test laid down in the *Mobile* case for eligibility for filing of a contract rate change under Section 4(d) of the Natural Gas Act is not met here."  
(Resps. br., p. 11).

Petitioners do not "assault", as respondents then suggest, the rule of law laid down by this Court in the *Mobile* case (Resps. br., p. 20). Petitioners accept that §4(d) of the Act which requires the filing of rate changes is not a grant of power to a natural-gas company unilaterally to change its contracts merely by filing increased rate schedules and that a unilateral announcement of a change in a *fixed* price contract would be a nullity (Resps. br., p. 32).

But the *Mobile* decision goes no further. It does not, as respondents would have it, transform these service agreements into *fixed* price contracts by interdicting the very rate filings which the agreements contemplate.

The reliance of respondents solely upon the statements of this Court in the *Mobile* decision reveals that their entire argument is based upon the assumption that there is involved here a change in the parties' contract. But, unlike the contract for a fixed rate in the *Mobile* decision, the promises by the seller and the buyers in these service agreements do not contemplate such a fixed rate.



The salient fact—a fact which the respondents do not dispute—is that the parties to these service agreements did not bargain for, expect or agree that there would be a particular fixed rate for the term of the agreement.

Under these agreements, the buyer promises to pay the seller's presently existing rates and for this purpose the then existing rate schedule is incorporated by reference. The buyer also promises to pay the changed or "superseding" rate when made "effective" under the Act. Under this price term, therefore, United's filing of increased rates does not change the *terms* on which the parties have agreed. *There is no change of contract.*

When United changed its rates it was exercising its power to establish new rates in exact accord with the price provision of the service agreements. When it gave notification of such change by filing its new rate schedules with the Commission, it was complying with the provisions of § 4(d) of the Act. When the Commission suspended the operation of such schedules, it was acting in accordance with the powers conferred upon it by Congress. When these petitioners contested the level of the rates they were addressing themselves solely to the public issue of whether the rates met the Act's standard of "just and reasonable."

Respondents conclude that the parties' agreement does not meet the test of the *Mobile* case because this Court there said that § 4d provides " . . . for notice to the Commission of any 'change . . . made by' a natural gas company, and the change is effected, if at all, not by order of the Commission but solely by virtue of the natural gas company's own action." (350 U. S. at 342). Respondents' conclusion is required, they say, because the petitioners must concede that " . . . the agreement was not to pay the rate which United might file, but only to pay the rate which

the Commission made effective." (Resps. br., p. 38, emphasis supplied).

But this is not what the agreement provides, not the understanding of the parties, nor is it the petitioners' construction. The agreement, as it expressly states, was to pay the effective superseding rate *on file* with the Commission. The quoted statement of this Court related to an attempt by the natural-gas company to have the Commission change a *fixed* price contract where the seller had no power under the terms of that agreement, solely by virtue of its own action, to establish a new rate and give notice of the change. In this case, the seller under these service agreements had the power to establish its changed rates and the power to file its increased rate schedules. No action of the Commission was required to enable such filing.

To respondents, the use by this Court and the court below and by the various petitioners of such words as "proposal," "procedure," "mechanism," "arbitration," "arbitrament," and "unilateral" appear dispositive of the real issues. Ideas obviously intended to have been expressed are relegated to the background.

Thus, the statement by this Court in *Mobile* that §§4(d) and 4(e) of the Act did not contemplate the making of rate "proposals" to the Commission as part of a "procedure" by which a natural-gas company could initiate unilaterally changes in its rate contracts, would condemn as unacceptable, in respondents' contentions, the increased rates filed by United merely because the Commission referred to them as "proposals." It is interesting to note, in this connection, that §4(e) of the Act refers to a rate change filed under §4(d) as "the *proposed* change" (Emphasis supplied).

Similarly, respondents would discredit the views of petitioners because, in various contexts, petitioners have referred to the "procedure" or "mechanisms" for rate change established by contract. Respondents appear oblivious of the fact that *Mobile* did not, in any way, deal with contract "procedures" or "mechanisms" or wipe out the obvious fact that §§4(d) and 4(e) establish the only permissible procedure by which a changed rate can be made effective by a natural-gas company.

Again, they seize upon the use by United and Southern in arguments to the Commission of the words "arbitrament" and "arbitration," as support for the erroneous conclusion of the circuit court that the Commission exercised an unauthorized arbitration function when it reviewed United's filed rates. The parties did not intend that the Commission should arbitrate their private rights or interests relating to the rates to be paid, as the record as a whole clearly shows. The Commission's role was to review the rates properly before it and determine their lawfulness in accordance with the public standards of "just and reasonable" which are established by the Act.

Repeatedly, throughout their brief, respondents refer to United's filing as a "unilateral" filing, seeking to condemn it by the use of that adjective because this Court said that a natural-gas company could not unilaterally change its contracts by filing a new rate under §4(d). Respondents, however, cannot change the fact that United's filing here was in pursuance of the agreement between the parties which plainly contemplated that United could file superseding rate schedules without further consent of the purchasers.

**Respondents' Contentions as to These Service Agreements.**

Despite the Commission finding that the parties intended that United should have the power to change its rates and file increased rates under these service agreements—a finding supported by substantial evidence—respondents then contend that the price term must be construed in such a way as to require United to negotiate and obtain the agreement of its customers to new rates before their filing with the Commission.

Respondents contend that the expressed promise to pay under “any effective superseding rate schedules” has no other function than to make certain that the parties will continue to sell and purchase the quantities provided for in the agreement during its term,

“\* \* \* even if the Commission exercises its regulatory power to impose a rate other than the rate agreed upon by the parties. It precludes the defense of illegality or impossibility based upon the Commission’s action; in effect, it makes Commission action a part of the contract.” (Resps. br., pp. 51-2).

But, no provision in the parties’ agreement is necessary to make certain of such continued performance, since any agreement subject to regulation by public authority—when modified by that authority—continues in full force and effect (Pet. br., pp. 14-6). The recognition of this is contained in the General Terms and Conditions of United’s Tariff, which are incorporated by reference in the price term of the service agreements.

The General Terms and Conditions provide (R. 45):

“This Tariff and any Service Agreement thereunder is expressly made subject to all present or future valid rules, regulations or orders of any commission or regulatory body having jurisdiction.”

Thus, respondents' construction (Resp. br., p. 52) of the price provision as nothing but a recognition of the buyer's obligation to pay such rates as might be ordered by the Commission (after a hearing under §5[a] or §4[e]) would render the price term meaningless and does not conform to the provisions of the price term itself.

Nor can it be said, as respondents urge, that the price term contemplated the filing under §4(d) only of such rates as might thereafter be agreed upon by United's customers. The words do not so provide and would have no meaning if so construed. There would be no purpose in obtaining in this agreement a promise of the buyer to pay at such future rates as the buyer might thereafter agree to pay.

Indeed, had a buyer expected under these service agreements to pay only such increases in rates as it might thereafter agree to, it seems inconceivable that it would execute a service agreement containing the instant provision which, particularly in light of the general understanding of the industry, so clearly contemplated changes in rates. At best such language would produce only confusion and uncertainty.

Respondents' construction of this price term cannot escape the weight of the facts of record. The uncontradicted statements of United, Texas Gas and Southern are that they intended by the language used in these agreements that United should have the power to file its superseding rate schedules with the Commission which would then be the rates payable, subject only to suspension and modification upon Commission review. It is implicit in these statements that they intended United to have the right to change its rates, subject to the Act's provisions.

The Commission found that such was the understanding of all the parties.\*

This explicit finding of the Commission is based, among other things, upon consideration of the practical construction of the agreements by the parties in their proceedings before the Commission, the Commission's intimate knowledge of the industry, the meaning and purpose of its own regulations within the framework of which United's sales arrangements were formulated, and the general understanding throughout the industry and of the Commission of the meaning of service agreement provision for payment under "superseding" rate schedules.

Respondents urge (Resp. br., p. 55, fn. 31) that Texas Gas' construction of United's price term cannot be reconciled with that of service agreements under which Texas Gas itself is a seller. While respondents demonstrate a somewhat remarkable misunderstanding of the Texas Gas price provision, the actual terms are perfectly clear.

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\* Respondents misrepresent the Commission's findings to be that the service agreements, as interpreted by petitioners, conferred a right on United "• • • only to *make a filing—to make a proposal* for an increase in rates" (Resp. br., p. 28, emphasis respondents').

The definitive finding of the Commission, which is decidedly different, is expressed in the following paragraph:

"The words 'or any effective superseding rate schedules on file with the Federal Power Commission' clearly contemplate the understanding and intent of the contracting parties that changes could properly be made by United in the rates contained in the applicable rate schedules in effect at the time of execution of the service agreement. It is equally clear that it was the understanding and intent of the parties that the purchaser would pay the rates set out in the applicable rate schedules effective from time to time and that changes could be made therein by United under the procedures established under section 4 of the Act." (R. 231).

This Court is not confronted with a conclusion by the circuit court that the Commission's findings were unsupported by substantial evidence. The lower court accepted the Commission's findings as to the contractual intent of the parties (R. 267).

The agreement provides that the buyer shall pay at the "Seller's legally effective rate." Seller's "present legally effective rate" is then designated by reference to a rate schedule on file with the Commission. The agreement then provides:

"Seller may file with the Federal Power Commission, or other body having jurisdiction, for a change in the rates and charges effective as to Buyer; \* \* \*"

The tax reimbursement clause in the Texas Gas agreement—a part of which respondents quote—is merely a proviso which represents an additional agreement by the buyer that the seller shall have the right, without a general rate increase filing, to an automatic adjustment in its rates should the Commission amend its regulations which presently prohibit any such automatic change in rate.

While the agreement of Texas Gas expressly provides that the seller may file its changed rates, it is not in any way inconsistent with petitioners' construction or understanding of the price provision of United's service agreement.

#### **Respondents' Contentions as to Sales for Industrial Use.**

Respondents make a further argument based, purportedly, upon the sales of gas for resale for industrial use. This argument appears to be that the proviso in §4(e) of the Act prohibiting the suspension of new rates for gas sold for resale for industrial use only, combined with the importance of industrial sales to distributors, makes it unlikely that any distributor would by contract give the seller the right to file unspecified rate increases (Resp. br., pp. 16-7, 65-71).

Despite respondents' statements to the contrary, purchases by distributing companies under non-suspendible

rates are of relatively little over-all importance, as is shown in pages 81-82 of the Commission's brief.

In purporting to counteract the Commission's assertions that purchases of gas under *non-suspendible industrial rates* are of limited significance, respondents attempt to eliminate the vital distinction between *purchases from a pipeline under non-suspendible industrial rates* and *sales by a distributor for industrial purposes*. They state:

"Upon the basis of statistics not pertinent to the issue, the Commission apparently urges that the sales of gas *for resale for industrial use only* are of little significance. In fact, however, *industrial sales* are of great significance in the economy of distribution and have a major effect upon the feasibility of supplying gas to domestic consumers at reasonable rates. In the case of Mississippi, for example, *sales for industrial purposes* represent 64.9% of the volume purchased from United and 43.7% of revenues derived from sale of gas purchased from United." (Resps. br., p. 17, emphasis supplied).

Respondents are careful not to state that these large percentages relate to the percentage of gas purchased under non-suspendible rates. In fact, most of the gas sold by Mississippi Valley for industrial use is purchased under general service rates which, of course, *are suspendible* and which are, in fact, suspended and collected subject to refund under the provisions of the Act.

The significant percentage is the percentage which the volume *purchased by Mississippi Valley under non-suspendible (industrial) rates* is of the total gas purchased. Of its total purchases from its five pipeline suppliers in 1957, only 5.7%, by volume, was purchased by Mississippi Valley under *non-suspendible rate schedules*. During 1957, Memphis purchased no gas under non-suspendible rate schedules.

The respondents further point out that "The fact is, of course, that *sales by a distribution* company of gas for industrial use reduce the average cost of gas to residential consumers, who use gas for space-heating, cooking and water-heating." (Resps. br., p. 67, emphasis supplied). With this observation, there is no dispute. However, the "average cost of gas to residential consumers" is reduced essentially by the industrial gas that is purchased by the distributing company *under a general-suspendible-rate* and not the gas purchased under an industrial-non-suspendible rate.

The average cost paid by a distributor for gas purchased under a general-suspendible-rate decreases as the volume of gas purchased under that rate increases (in the case of a block type rate, such as the rate under which Mississippi Valley purchases from United) or as the load factor of the purchases under that rate increases (in the case of a two-part demand and commodity rate), with the result that sales to industry in off-peak seasons of gas which is purchased under the general rate reduces the average cost of the total volume of the gas purchased under the rate. However, purchases made under industrial non-suspendible rates are made at flat prices, are not taken into account in computing the volume or the load factor of purchases under the general rate and, accordingly, have no effect on the cost of gas under the general rate schedule.

Respondents further state that industrial sales are vital to a gas distributor because necessary to enable it to obtain maximum utilization of distribution facilities and so keep to a minimum that portion of the distributor's fixed charges applicable to each Mcf of gas sold.

Of the five large-volume industrial customers for which United sells Mississippi Valley gas under an industrial rate schedule, three receive deliveries at special delivery

points and the gas does not enter the local distribution system (R. 62). Presumably, gas for the two remaining industries does not pass through all or any major portion of the general distribution facilities of the distributor, for it is to be supposed that even where the industrial gas enters the general distribution system, because of its large volume (in excess of 200,000 Mcf a year [R. 22]) it is transported principally by means of different and larger mains than those used to supply residential customers.

The whole thrust of respondents' argument concerning industrial rates is that no distributor would voluntarily give its pipeline supplier the right to file unspecified changed rates with the Commission. Yet, respondents, in footnote 31 beginning at page 55 of their brief, point out, in another context, that the service agreements of El Paso Natural Gas Company and Northern Natural Gas Company expressly provide for that right.

The stress that respondents place on the lack of the Commission's power to suspend increases in rates of gas purchased for resale for industrial use only almost suggests that they would have this Court decide this case on the claims of economic harm done them under an alleged hiatus in the statutory scheme of regulation of the natural-gas industry. Congress plainly considered the distinction it was creating in §4(e) between rates for resale for industrial use only and rates for resale for general use. As Representative Cole of Maryland commented to a witness during the hearings on the Natural Gas Act, "Of course, Mr. Benton, the industrial field is competitive, and that to an extent should regulate itself" (*Hearings before the Subcommittee of the House Committee on Interstate and Foreign Commerce, 74th Cong., 2nd. Sess. at 95 [1936]*).

If distributors consider the non-suspendibility of industrial rates to be a hazard despite competitive conditions, they are free to contract with respect to such rates with their pipeline suppliers for firm prices for a fixed term of years. This was the type of contract that was involved in the *Mobile* case and nothing restrains the respondents or any other distributors from negotiating a similar contract for their protection.

**Respondents' Contention as to  
Petitioners' Rate Settlements.**

Petitioners have preferred to confine their argument to the law and facts of record except as required because of certain of respondents' contentions.

It is obvious that an affirmance of the decision below, which upsets and unsettles an established course of administrative procedure and rate-making founded on Order 144, as promulgated in 1948, will have a profound economic effect. Respondents' optimistic view of the matter rests upon an incomplete statement of the facts in the various situations, not of record, underlying the settlements and expansion programs which respondents describe.

It is appropriate for these petitioners to respond to respondents' contention that the recent rate increases filed by Texas Gas and Southern which were agreed to by the companies' customers prior to filing, illustrate that pipelines can adapt readily to the requirements of the decision below (Resps. br., pp. 35-36).

The inference drawn by respondents cannot be supported by the facts. Texas Gas' rate filing (Resps. br., p. 83) was

made on December 20, 1957 as a result of a rate settlement achieved under the procedures established by the Commission and prevailing prior to the decision of the Court of Appeals. Under these procedures, Commission Staff personnel had completed one year of field investigation of Texas Gas' records and accounts immediately preceding the settlement. It was only after this investigation that Texas Gas and its customers, with the Staff participating, had met in settlement conferences and substantially completed settlement negotiations.

Southern's rate increases agreed to by 93 of its customers, which respondents refer to at page 83 of their brief, were filed March 31, 1958 *after* the decision below, but the original rate increase filing, as to which the March 31, 1958 filing represented a compromise, was made on August 14, 1957, *prior* to that decision. As in the Texas Gas settlement, an investigation of Southern's records and accounts had been made by the Commission's Staff, and it was after such investigation and, with the Staff participating in the settlement conferences, that Southern and its customers reached agreement. Here, too, the customers relied heavily upon the results of the Staff's field investigation. It should also be pointed out that the customers needed additional gas supplies which could not be made available to them without expansion of Southern's pipeline capacity made possible by higher rates.

Neither of these two examples can be cited for the proposition the respondents urge. The facts lead to the contrary conclusion. Pipeline companies, whose rates are fixed on the basis of then existing costs, do not have the

financial capacity to absorb subsequent increases in the cost of gas and other expenses which in most cases are substantial in amount and over which they have little or no control. They must be able to secure rate increases offsetting these costs promptly in order to maintain their ability to supply the demands of their customers. Under the regulatory procedures of the respondents and the court below, the pipeline industry would be powerless to obtain reimbursement for increased costs until after a proceeding by the Commission under §5(a) of the Act or the successful completion of protracted negotiations with customers, even if feasible.

As the Commission has observed:

"We do not imply that none of the pipeline companies will be able to secure customer agreement to rate increases, for this obviously will not be the situation. Customers have agreed in the past, they have agreed since the *Memphis* decision was handed down on November 21, 1957 and it is to be expected that other pipelines and their customers will compromise their differences. Nevertheless, there is almost no economic incentive for a customer to agree to pay higher rates if it is satisfied with its service and does not need additional supplies or expanded service. On the other hand, if the requirements of a customer are expanding, it must ask the pipeline to meet those needs and, therefore, it could be forced to agree to a rate increase, although this situation does not prevail among all customers of all pipelines by any means." (El Paso Natural Gas Company, 19 F. P. C. 154, 161 [1958]).

**Conclusion.**

**The decision below should be reversed.**

**Respectfully submitted,**

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**October 16, 1958.**



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**SUPREME COURT, U.S.**

**IN THE**

**Supreme Court of the United States**

**OCTOBER TERM, 1958**

**No. 695.** *86*

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**FILED**

**JAN 30 1958**

**T. FEY, Clerk**

**TEXAS GAS TRANSMISSION CORPORATION AND  
SOUTHERN NATURAL GAS COMPANY,**

*Petitioners,*

**MEMPHIS LIGHT, GAS AND WATER DIVISION, CITY  
OF MEMPHIS, TENNESSEE, AND MISSISSIPPI  
VALLEY GAS COMPANY,**

*Respondents.*

---

**REPLY OF TEXAS GAS AND SOUTHERN TO  
BRIEF IN OPPOSITION.**

---

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1957.

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No. 695.

---

TEXAS GAS TRANSMISSION CORPORATION AND  
SOUTHERN NATURAL GAS COMPANY,  
Petitioners,

v.

MEMPHIS LIGHT, GAS AND WATER DIVISION, CITY OF MEM-  
PHIS, TENNESSEE, AND MISSISSIPPI VALLEY GAS COMPANY,  
Respondents.

---

**REPLY OF TEXAS GAS AND SOUTHERN TO  
BRIEF IN OPPOSITION.**

Respondents' brief cites no authority to support their contention that the Commission lacks jurisdiction to accept for filing under §4(d) of the Act the new schedules increasing rates filed by United in this case. That the service agreements here involved are not *Mobile*-type contracts has been shown in Petitioners' brief. This is, moreover, obvious on the face of the agreements.

There is, however, one misleading statement by Respondents which requires comment. In their brief, Respondents attempt to discount the Petitioners' contention that system-wide negotiations for needed increases in rates is an impractical procedure for the industry. Respondents state:

"Texas Gas, since the *Memphis* decision and in accordance therewith, concluded negotiation of agree-

ments for increased rates with all but one of its customers—64 in number, including Memphis and Mississippi Valley—and on December 20, 1957 filed them with the Federal Power Commission . . .” (p. 21).

As Respondents are well aware, because they were parties to the negotiations and the settlement agreements, it was possible for Texas Gas to obtain these agreements only because the settlement of new rates was well advanced at the time the court below rendered its decision, and the essential elements involved in these increases had been extensively examined and reviewed in proceedings under §4(e) of the Act following the filing of increased rates by Texas Gas in June, 1956 (F. P. C. Dkt. No. G-10,751).

Furthermore, the agreements for increased rates concluded with Texas Gas' customers have prospective effect only. During the period from February 15, 1957 (when increased rates filed by Texas Gas went into effect subject to refund) to the time when its new rates went into effect under the agreements, the aggregate of the increases collected by Texas Gas amounted to approximately \$8,000,000. Most of this amount represents increased costs which Texas Gas had borne during this period. Under the regulatory procedures of the court below, the pipe line industry would be powerless to obtain reimbursement for increased costs necessarily incurred pending the completion of protracted negotiations with customers, even if feasible, or a proceeding by the Commission under §5(a) of the Act.

Indeed, Respondents Memphis Light, Gas and Water Division and the City of Memphis have moved the Commission to require Texas Gas to refund, with interest, the increased amounts collected prior to the settlement (F. P. C. Dkt. No. G-10,751).

The circumstances of this settlement demonstrate, rather than disprove, the "impracticality" of the regulatory scheme which the decision below would enact. Under such a regulatory scheme, rate increases cannot become effective in time to meet increased costs; expeditions and necessary adjustments in rates become impossible and §4(d) is read out of the Act.

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January 30, 1958.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1958

Nos. 23, 25 and 26

**UNITED GAS PIPE LINE COMPANY, ET AL.,** *Petitioners*

**MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.**

**PETITION FOR REHEARING**

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December 31, 1958

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1958

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Nos. 23, 25 and 26

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UNITED GAS PIPE LINE COMPANY, ET AL., *Petitioners*

v.

MEMPHIS LIGHT, GAS AND WATER DIVISION, ET AL.

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**PETITION FOR REHEARING**

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*To the Honorable, the Chief Justice of the  
United States and the Associate Justices of  
the Supreme Court:*

Pursuant to Rule 58, Revised Rules of the Supreme Court of the United States, Memphis Light, Gas & Water Division, the City of Memphis, Tennessee, and Mississippi Valley Gas Company, Respondents, respectfully ask that this Honorable Court grant a rehearing of its decision filed December 8, 1958, reversing a judgment of the United States Court of Appeals for the District of Columbia Circuit and upon such rehearing set aside the decision of December 8, 1958, and remand the cause to said Court of Appeals

for consideration of the question of the proper interpretation of the price provisions of the service agreements here involved which provide that all gas delivered under the service agreement shall be paid for by the buyer at a rate specified in a designated rate schedule of the seller "or any effective superseding rate schedules on file with the Federal Power Commission."

### **JURISDICTION**

The decision of this Honorable Court reversing the judgment of the United States Court of Appeals for the District of Columbia Circuit was filed December 8, 1958. Within the time prescribed by the rules of this Court, this Petition for Rehearing is hereby presented.

### **GROUND FOR REHEARING**

1. The Court's interpretation of the price provision of the service agreements as constituting an undertaking by the purchaser to pay United Gas Pipe Line Company's "going" rate (slip sheet opinion, page 7) is not supported by and is contrary to the interpretation placed upon the price provision by United and its pipeline customers, Texas Gas Transmission Corporation and Southern Natural Gas Company on the record in the Commission. United and its pipeline customers claimed on the record before the Commission no more for the provision than the establishment of a "procedure", "mechanism", or "method" for changing rates.

2. The Court's interpretation of the price provision of the service agreements as constituting an undertaking by the purchasers to pay United its "going" rates (slip sheet opinion, page 7) is not supported by

and is contrary to the Federal Power Commission's interpretation of said provision in its Opinion in this cause. The Commission in its Opinion did not construe the price provision as constituting agreement to pay a "going" rate, but only as providing agreement for the establishment of a "procedure", "mechanism", or "method" for changing rates, the Commission thereby adopting the construction of the price provisions urged before the Commission by United, Texas Gas and Southern.

3. The Court's interpretation of the price provision of the service agreements as constituting an undertaking by the purchasers to pay United's "going" rates (slip sheet opinion, page 7) is contrary to the interpretation of such provision adopted by the Court of Appeals for purposes of decision only. The Court of Appeals did not assume an agreement to pay the "going" rates, but only an agreement concerning the filing or proposing of new rates as part of an arbitration-type rate-changing "mechanism", "method" or "procedure".

## ARGUMENT

### Introduction

The business reality which underlies this Court's opinion in *United Gas Pipeline Company v. Mobile Gas Service Corporation*, 350 U.S. 332, is the necessity for stability of supply arrangements in the natural gas industry. Such stability "all agree is essential to the health of the natural gas industry." (350 U.S. at 344) The Court pointed out the untenable position which the distributor would occupy "if its supply contracts are subject to unilateral change by the natural gas company whenever its interests so dictate." (Id.) So

the Court concluded that Congress did not empower natural gas companies unilaterally to change contract rates—and that such holding “fully promotes the purposes of the Act.” (Id.)

Congress, therefore, recognized the distributors' essential need for stability of supply arrangements, which ruled out a construction allowing unilateral increases by pipeline companies. The same need was apparent to this Court upon consideration of the matters involved in *Mobile*.

But now the Court holds that the distributors have voluntarily contracted away the very thing which all agree is essential to their economic health. By contracting for twenty (20) years to pay United's “going” rate, the distributors have themselves made their contracts “subject to unilateral change by the natural gas company whenever its interests so dictate.” (The effect of such interpretation upon the sales for industrial use only is succinctly dealt with in the dissenting opinion.)

Under that construction, the distributors have granted enormous economic powers to their pipeline suppliers—powers which *Mobile* held that Congress never intended the pipelines to have. It is illuminating to consider who argued for such an interpretation in the hearings before the Commission. It was supported by United—a *pipe line company*; it was supported by United's customer, Texas Gas—another *pipe line company*; it was also supported by Southern Natural Gas—another *pipe line company*. But the vast majority of United's customers under such contracts are distributors, and every distributor who spoke—Mississippi Valley Gas Company, Willmott Gas and

Oil Company, and Mobile Gas Service Corporation—took a contrary view. The Commission by accepting the pipeline position allowed the pipelines to act as spokesmen for the distributors whose interests are diametrically opposed. Having adopted in its Opinion the pipelines' representations as to what the distributors intended in their service agreements, the Commission continued to argue for the pipelines' construction in the courts.

The purport and effect of the *Mobile* decision was to inject into natural gas regulation a desperately needed element of stability, by deciding a question which the Court felt was of importance in the administration of the Natural Gas Act (350 U.S. at 337). The purport and effect of the present decision is to limit *Mobile* to the precise type of contract there involved, of which the Commission says there are only 18 in existence (F.P.C. Main Brief, p. 6), and to validate the general practice of unilateral rate increases by pipelines, the very practice condemned by *Mobile* as incompatible with a healthy gas industry and as contrary to the Act.

# I

**UNITED ON THE RECORD OF THE CAUSE CONSTRUED  
ITS SERVICE AGREEMENTS, NOT AS PROVIDING  
AGREEMENT TO PAY THE "GOING" RATE, BUT  
ONLY AS PROVIDING A METHOD OR MECHANISM  
FOR CHANGING RATES**

The strongest proof of the above statement is found in United's Brief in this Court at page 49:

"The only evidence in the record below as to the intent of the parties is that these words [the 'effective superseding rate schedules' provision] imported a mechanism for rate change."

(brackets supplied)

United accepted and never took issue with the description of the provision by its customer Southern as contemplating an arbitration procedure (R. 4). In fact it spoke of the "mechanism" created by the provision in terms of the "contest" between the parties and the "arbitrament" of the Commission (R. 208-209).

While some of the statements in United's brief in this Court seek to enlarge its position on the record, nowhere does it claim that its distributor customers obligated themselves to purchase gas at United's "going" rate, chosen unilaterally by United, subject only to Commission review. Indeed, this concept of a "going" rate for pipeline companies' sales of natural gas is not only without support in the record, but is also incompatible with the universal practice in the natural-gas pipeline industry of establishing the buyer-seller relationship only through individualized contracts and arrangements because of the substantial investments in capacity and facilities typically required of buyer and seller for the performance of the service (*Mobile*, 350 U.S. at 338-339). This is in marked contrast to the transportation industry where the relationship is established by the shipper's tender of goods for shipment at the carrier's posted, current "going" rate.<sup>1</sup>

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<sup>1</sup>The Court's construction of the "effective superseding rate schedules" provision of the contracts as agreement by the buyer to purchase natural gas at United's "going" rate, to wit, the rate chosen unilaterally by United in its unfettered discretion, which in the case of rates for sales of natural gas for industrial use only are subject to limited and largely ineffective Commission review and correction, takes no cognizance of the succession of unilateral price changes filed by United in Federal Power Commission Dockets No. G-9547, G-10592, G-12801 and G-15360; no one of which has yet been adjudicated by the Commission, and in the light thereof is particularly unwarranted.

United's service agreements are consummated sale contracts, under which purchasers are obligated to accept all requirements or certain large minimum quantities of gas every year for terms up to twenty years. The sale is complete upon the signing of the contract. Yet, under the Court's construction, there is no firm agreement upon price, the price being subject to United's unilateral will, the only check being the upper limit of the zone of reasonableness as established by the Commission.

United's contention on the record before the Commission was not that the price was whatever price within the zone of reasonableness it unilaterally established as the "going" rate, but rather that any change in rate was subject to arbitration by the Federal Power Commission. United and the Commission carefully avoided claiming agreement on the "going" rate, for fear of being shown clearly to have violated the basic legal principle that

"A contract for the future delivery of personal property is void for want of mutuality if the price is conditioned entirely on the will of one of the parties."

*Taller & Cooper v. Illuminating Electric Co.*, 172 F. 2d 625, 626. See also: *Lipman v. Arlington Seating Co.*, 192 F. 2d 93, 96, quoting above rule; *Brooks v. Federal Surety Co.*, 58 App. D. C. 56, 24 F. 2d 884, 57 ALR 745.

## II.

**THE COMMISSION CONSTRUED THE SERVICE AGREEMENTS NOT AS PROVIDING AGREEMENT TO PAY THE "GOING" RATE, BUT AS PROVIDING FOR THE FILING OF A PROPOSAL WHICH INITIATED A METHOD OR MECHANISM FOR CHANGING RATES**

Again United's brief provides support for what the record establishes conclusively. In its main brief on the merits, United's Point IV (p. 49) is:

**"THE COMMISSION'S FINDINGS THAT THE SERVICE AGREEMENTS HEREIN PROVIDED FOR A METHOD OF RATE CHANGE TO WHICH THE BUYERS CONSENTED, ARE CONCLUSIVE."**

The Commission's Opinion expressly adopted the construction which the pipelines placed upon United's service agreement. Since United clearly construed the provision as agreement only upon a method or mechanism of rate change, the Commission could not have construed it as granting United more power than United claimed from it. The Commission's repeated reference to United's filing as a "proposal" must, therefore, have been intended to mean what it said (R. 225, 231, 236).

The Commission's Opinion, therefore, held that United had a contract right to file a proposal, not unilaterally to fix a new "going" rate (R. 236).

## III.

**THE COURT OF APPEALS, IN ACCEPTING FOR PURPOSES OF DECISION THE COMMISSION'S INTERPRETATION OF UNITED'S SERVICE AGREEMENTS, DID NOT ASSUME THAT THEY PROVIDED FOR PAYMENT OF THE "GOING" RATE, BUT ONLY FOR THE FILING OF NEW PROPOSED RATES FOR ARBITRATION**

In discussing the Commission's holding, the Court of Appeals stated (R. 267):

"In effect, the Commission's position is that contractual consent to the *act of filing* is sufficient for Section 4(d) \* \* \*." (Italics by the Court)

The record in that court allowed of no more favorable a version to United, for United had not then claimed any unilateral right to fix a "going" rate from time to time.

The Court of Appeals clearly held that the agreement went no further than the "act of filing", which had the effect of initiating an arbitration proceeding, as described on the record by Southern Natural Gas Company (R. 4).

Therefore, when this Court construed United's contracts as importing an agreement by the customer to pay a unilateral "going rate", it did so without the benefit of any examination into that question by the Court of Appeals and the legality of such a contract. The Court of Appeals did not address itself to the question of contract construction. It merely adopted for purposes of decision what was then clearly the construction of the Commission and the pipelines. Now this Court, also purporting to adopt the construction urged by the Commission and the pipelines, finds an entirely different contract. The explanation

lies in the fact that the Commission and pipelines, having lost in the Court of Appeals, set forth their contracts in this Court in a vastly different light from that which the record in the cause supports.

### CONCLUSION

All parties agree that the contracts involved in this case are typical of those existing generally in the natural gas industry. The Court's construction of the contracts will, therefore, bind virtually all distributors throughout the nation. Yet the construction adopted by the Court purports to follow a Commission construction based entirely upon contentions of pipeline parties to United's contracts.

Such a construction is extremely disadvantageous to the distributor. It requires a conclusion that the distributor, to whom rate stability is essential, has deliberately given away all protection against repeated rate increases at any time his supplier's business interests so dictate. It requires a conclusion that the distributor has frustrated by his own contracts the purpose of Congress to protect him against unilateral changes in contract rates.

Practically speaking, such a construction deprives the entire natural gas industry of the rate stability which this Court's *Mobile* opinion so timely provided for it.

Respondents did not suggest that the question of contract construction be remanded for consideration by the Court of Appeals, because they did not foresee that this Court's construction would go beyond the interpretation assumed by the lower court. But Respondents now earnestly suggest that this Court

avail itself of the consideration of the Court of Appeals upon this important question before making so far-reaching a decision upon a construction not even considered by the lower court.

WHEREFORE, Respondents respectfully pray that this Court grant a rehearing in this cause and upon such rehearing set aside the decision filed December 8, 1958 and remand the cause to the United States Court of Appeals for the District of Columbia Circuit for consideration of the question of the proper interpretation of the price provisions of the contracts involved herein.

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December 31, 1958

**CERTIFICATE OF COUNSEL**

We, the undersigned Counsel in the above cause do hereby certify that the above and foregoing Petition for Rehearing is presented in good faith and not for delay.

/s/ REUBEN GOLDBERG  
Reuben Goldberg

/s/ GEORGE E. MORROW  
George E. Morrow

**CERTIFICATE OF SERVICE**

I, Reuben Goldberg, one of the attorneys for the Respondents; and a member of the bar of the Supreme Court of the United States, do hereby certify that on the 31st day of December, 1958, I served copies of the Petition for Rehearing of Memphis Light, Gas & Water Division, the City of Memphis, Tennessee and Mississippi Valley Gas Company to each of the following at the respective addresses shown by mailing a copy thereof, with first class or airmail postage prepaid as appropriate:

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## KEY TO BRIEFS

- 1 Petition for Writ of Certiorari, no. 23
- 2 Appendix to Petition for Writ of Certiorari, no. 23
- 3 Reply Brief of United Gas Pipe Line Co. on Petition for Certiorari, no. 23
- 4 Brief of Petitioner United Gas Pipe Line Co., no. 23
- 5 Appendix to Petitioner's Brief, no. 23
- 6 Reply Brief for Petitioner United Gas Pipe Line Co., no. 23
- 7 Brief for the Federal Power Commission, nos. 23, 25-26
- 8 Reply Brief for the Federal Power Commission, nos. 23, 25-26
- 9 Brief of Memphis Light, Gas and Water Division, The City of Memphis, Tennessee and Mississippi Valley Gas Co. in Opposition, nos. 23, 25-26
- 10 Brief of Memphis Light, Gas and Water Division, et al., nos. 23, 25-26
- 11 Answer of Memphis Light, Gas and Water Division, et al., in Opposition to Motions for Leave to File Briefs Amici Curiae in Support of Petitioners, nos. 23, 25-26
- 12 Motion of the Ohio Fuel Gas Co., et al., for Leave to File Brief Amici Curiae in Support of Petitions, nos. 23, 25-26
- 13 Answer of Memphis Light, Gas and Water Division, The City of Memphis, et al., in Opposition to Motions for Leave to File Briefs Amici Curiae in Support of Petitions for Writs of Certiorari, nos. 23, 25-26
- 14 Brief Amici Curiae of the Member Municipalities of the National Institute of Municipal Law Officers in Opposition, nos. 23, 25-26
- 15 Motion of Natural Gas Pipeline Company of America, et al., for Leave to File Reply Brief Amici Curiae, nos. 23, 25-26

- 16 Motion of Natural Gas Pipeline Co. of America, et al.,  
for Leave to File Brief Amici Curiae, June 3, 1958,  
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- 17 Motion of Amere Gas Utilities Co., et al., for Leave to  
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- 18 Motion of People of the State of California, et al., for  
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- 19 Brief Amicus Curiae of the Attorney General of the  
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- 20 Brief of the People of the State of Tennessee, Amicus  
Curiae, nos. 23, 25-26
- 21 Brief Amicus Curiae of the State of Wisconsin, nos. 23,  
25-26
- 22 Brief of City of Hattiesburg, Mississippi, Amicus Curiae  
on the Side of Respondents, nos. 23, 25-26
- 23 Brief Amici Curiae of the Member Municipalities of the  
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25-26
- 24 Brief Amicus Curiae of the State of Washington, nos. 23,  
25-26
- 25 Petition for a Writ of Certiorari, no. 25
- 26 Reply Memorandum for the Federal Power Commission, no. 25
- 27 Motion of Natural Gas Pipeline Co. of America, et al., for  
Leave to File Brief Amici Curiae in Support of Peti-  
tions for Writs of Certiorari, no. 25
- 28 Motion of Natural Gas Pipeline Co. of America, et al.,  
for Leave to File Brief Amici Curiae in Support of  
Petitions for Writs of Certiorari, no. 25
- 29 Motion of Long Island Lighting Company for Leave to File  
Brief Amicus Curiae in Support of Petitioners and  
Brief Amicus Curiae in Support of Petitioners, no. 25
- 30 Petition for a Writ of Certiorari, no. 26

- 31 Brief for Petitioners, no. 26
- 32 Reply Brief for Petitioners Texas Gas and Southern, no. 26
- 33 Reply of Texas Gas and Southern to Brief in Opposition,  
no. 26
- 34 Petition for Rehearing, nos. 23, 25-26